Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

PAULINE KULZER, individually and as Executrix of the ESTATE OF RICHARD KULZER, deceased,

Petitioner,

vs.

OWENS-CORNING FIBERGLAS CORPORATION,

Respondent,

MANVILLE CORPORATION ASBESTOS DISABILITY COMPENSATION FUND,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Second Circuit err in issuing a mandate dismissing petitioner's entire complaint where the only issue before the Court pertained to the timeliness of petitioner's wrongful death claim and not her separate and distinct claims for personal injury and loss of consortium?

2. Did the mandate of the Second Circuit dismissing petitioners entire complaint deprive her of her Seventh Amendment right to trial by jury?

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Defendant-Respondent,

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Third-party Defendant-Respondent.

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OPINIONS BELOW

The opinion of the Court of Appeals (reproduced at Appendix, Page 1) (hereinafter "App.") is reported at 942 F.2d 122 (2nd Cir. 1991). The opinions of the District Court relevant to this petition are not reported in any official digest but are reproduced in the appendix at pages 20, 28, 37 and 47.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 8, 1991. An Order denying Petitioner's Motion for Rehearing was dated and entered on October 7, 1991 and an Order Denying Petitioner's Motion to Amend the Mandate was dated and entered on December 16, 1991. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The following constitutional provisions, statutes and regulations are involved in this petition:

1. The Seventh Amendment to the United States Constitution:

Trial by Jury in Civil Cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

2. The New York Toxic Tort Revival Act, Section 4.

Notwithstanding any other provision of law, every action for personal injury, injury to property or death caused by the latent effects of exposure to diethylstilbestrol, tungsten-carbide, asbestos, chlordane or polyvinyl-chloride upon or within the body or upon or

within property which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act; provided, however, that this section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which was not barred as of the date of the decedent's death and could have been brought pursuant to section 5-4.1 of the estates, powers and trust law, and provided further that for any revived claim or action, including third party claims and claims for contribution pursuant to article fourteen of the civil practice law and rules for which a notice of claim is or would have been required by law as a condition precedent to the claim or action, a notice of claim shall not be required.

3. The Estates Powers and Trust Law, Section 11-3.2(b):

Action for injury to person or property survives despite death of person in whose favor or against whom cause of action existed

(b) Action by personal representative for injury to person or property.

No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to

recover damages for personal injury where the death occurs on or before August thirty-first, nineteen hundred eighty-two. On the trial of any such action accruing before September first, nineteen hundred seventy-five, which is joined with an action for causing death, the contributory negligence of the decedent is a defense, to be pleaded and proved by the defendant. No cause of action for damages caused by an injury to a third person is lost because of the death of the third person.

4. The Estates Powers and Trust Law, Section. 5-4.1(1):

The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the distributees do not participate in the administration of the decedent's estate under a will appointing an executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit.

STATEMENT OF THE CASE

This action was filed on April 28, 1987 pursuant to the New York Toxic Tort Reform Act of 1986, Ch. 684, Sec.

4 ("revival statute") based in negligence and strict products liability against Owens-Corning Fiberglas ("OCF") and others alleging that Richard Kulzer's occupational exposure to asbestos caused him to develop and die from malignant mesothelioma in August of 1981. Petitioner, Pauline Kulzer, Richard Kulzer's widow and the personal representative of his estate, filed a complaint alleging three separate and distinct causes of action: (1) for conscious pain and suffering of Richard Kulzer prior to his death pursuant to New York EPTL 11-3.2, (2) for loss of consortium which under New York law is derivative of the conscious pain and suffering claim, and (3) for wrongful death pursuant to New York EPTL Sec. 5-4.1.

The case was first tried to a jury beginning April 17, 1990. At the close of petitioner's proof, OCF moved for a directed verdict on the wrongful death claim arguing that this claim was untimely and was not revived due to an express exception to the revival statute. The district court denied OCF's motion and the case was tried to completion resulting in a defendants' verdict. The district court later granted petitioner's motion for a new trial holding that the jury's verdict was against the weight of the evidence. (App. at 28-36).

Prior to the re-trial of this case, OCF made a motion to dismiss the wrongful death claim on the same grounds as it had in the first trial. The district court reserved on the motion and the second trial began on October 24, 1990. At the close of proof, the district court denied OCF's motion to dismiss petitioner's wrongful death claim. (App. at 47-55). On November 5, 1990, the jury returned a verdict for the petitioner awarding damages of $450,000.00 on petitioner's wrongful death claim,

$250,000.00 on petitioner's conscious pain and suffering claim, $25,000.00 for petitioner's derivative cause of action and $21,468.25 for medical and burial expenses. (App. at 45).

On November 30, 1990 OCF filed a notice of appeal in this action specifically appealing the district court's decisions at both trials denying OCF's motions to dismiss petitioner's wrongful death claim. (App. at 71-73). OCF did not raise any issue relating to the timeliness of petitioner's claim for conscious pain and suffering or petitioner's spousal derivative claim. *Id.*

On appeal, the Second Circuit Court of Appeals held that the district court erred in denying OCF's motion for directed verdict on petitioner's wrongful death claim in the first trial. *Kulzer v. Pittsburgh Corning*, 942 F.2d 122 (2nd Cir. 1991) (App. at 1). Even though the legal basis for the Second Circuit's decision applied only to petitioner's wrongful death claim, the mandate issued by the Court directed the dismissal of not only the wrongful death claim but also petitioner's separate and distinct claims for conscious pain and suffering and consortium.

On August 22, 1991, petitioner filed a motion for rehearing, with a suggestion of rehearing in banc, raising as one of the grounds the fact that the mandate directed the dismissal of the entire complaint instead of only the wrongful death cause of action. On October 7, 1991, the Second Circuit denied petitioner's motion for a rehearing without opinion and declined to hear the case in banc. (App. at 61-62).

On November 1st, 1991, the district court dismissed petitioner's complaint pursuant to the mandate despite

noting that " . . . in providing for the dismissal of the entire complaint rather than just the wrongful death claim, this mandate is clearly wrong and works a manifest injustice." (App. at 59).

On November 12, 1991 petitioner made a motion to the Second Circuit amend the mandate to dismiss only the wrongful death action. On December 16, 1991 the Second Circuit denied petitioner's motion to amend. (App. at 65).

REASONS FOR GRANTING THIS PETITION

A. The dismissal of petitioner's claims for conscious pain and suffering and loss of consortium deprive her of a valid jury verdict in violation of her Seventh Amendment right to a trial by jury.

The Seventh Amendment to the Constitution operates as a limit upon the judicial power of Courts of the United States. In an action at law, the Seventh Amendment prohibits a court from redetermining facts found by a jury and generally limits federal courts to the consideration of questions of law. *See Garcia v. Murphy Pacific Marine Salvage Co.*, 476 F.2d 303, 306 (5th Cir. 1973) (citations omitted).

In this case, the Second Circuit's mandate is unconstitutionally overbroad because it grants relief not requested by the respondent in the district court, not warranted by the statute which forms the legal basis of the Second Circuit's action, not briefed by any of the parties on appeal, and not explained in any way in the Second Circuit's written opinion. (See App. at 59, n.2).

This erroneous mandate unjustly deprives petitioner of her Seventh Amendment right to trial by jury by dismissing petitioner's jury verdict on two valid claims without any legal justification. The extent to which an overbroad mandate dismissing a valid jury verdict without explanation or legal justification violates a litigant's Seventh Amendment right to a trial by jury is an important question of federal law warranting action by this Court.

A full understanding of the Constitutional error in this case requires a brief discussion of the legal basis for both the petitioner's complaint and the respondent's motions to dismiss petitioner's wrongful death action. In 1986, the New York legislature passed a statute adopting a "discovery rule" for statute of limitations purposes in certain toxic tort cases. New York Toxic Tort Reform Act of 1986, Ch. 682, Sec. 4, *reprinted in* 1 McKinney's Session laws of New York 1567 (1986) ("revival statute"). The revival statute opened a one year "window" in which litigants whose actions had previously been time barred under the old rule could file damages claims based on exposure to toxic substances, including asbestos. *Id.*

Under the authority of the revival statute, petitioner filed a complaint within the one year "window" asserting three separate and distinct claims, each with its own separate statutory basis: a personal injury claim pursuant to the New York Estates, Powers, and Trust Law, Sec. 11-3.2, a wrongful death claim pursuant to the New York Estates, Powers, and Trust Law, Sec. 5-4.1, and a spousal derivative claim. In contrast to a surviving personal injury action, a wrongful death action is an entirely new and separate cause of action which is " . . . totally distinct

from the underlying personal injury cause of action, with its own statute of limitations . . . " J.M. McLaughlin, *Practice Commentaries*, "Retroactivity," *published in* 7B N.Y. Civ. Prac.L.& R. Sec.214-c. at 637 (1990).

At several points during the pendancy of this action, the respondent, Owens-Corning Fiberglas ("OCF"), sought to dismiss petitioner's wrongful death claim arguing that this claim was untimely and not revived by the revival statute. The revival statute contains an express exception which does not revive " . . . any action for damages for a wrongful act, neglect or default causing a decedent's death which was not barred as of the date of decedent's death and could have been brought pursuant to section 5-4.1 of the estates, powers and trust law . . . " Since petitioner's conscious pain and suffering claim and her spousal derivative claim were not brought pursuant to EPTL 5-4.1, OCF could not and did not move to dismiss these claims. In each instance, the district court denied OCF's motions to dismiss. (App. at 22, 39, 40-42, 47-55, 56-60, 66, 67-69, 71-73).

On November 5, 1990, a jury in the United States District Court for the Western District of New York, after listening to all of the evidence in a two week trial, awarded petitioner damages on each cause of action: $450,000.00 for wrongful death, $250,000.00 for conscious pain and suffering, and $25,000.00 for petitioner's derivative action. (App. at 45).

Owens-Corning Fiberglas appealed from the district court's various orders denying OCF's motions to dismiss petitioners wrongful death claim. (App. at 71-73). In its notice of appeal, OCF again failed to raise any issue as to

the timeliness of petitioner's remaining claims for conscious pain and suffering or her spousal derivative action, focusing instead only on the wrongful death claim. *Id.*

On appeal, a divided panel of the Second Circuit held that " . . . OCF's motion for a directed verdict should have been granted." (App. at 3, 15). As mentioned above, OCF moved for a directed verdict only on the wrongful death action and not on the separate claims for personal injury or the spousal derivative claim. (App. at 22, 39, 40-42, 47-55, 56-60, 66, 67-69, 71-73). The statute relied upon by the Court, Sec. 4 of the New York Toxic Tort Reform Act, explicitly bars only wrongful death actions brought pursuant to EPTL 5-4.1 and not to surviving personal injury or derivative claims which have a separate and distinct statutory basis. However, the Second Circuit erroneously believed that OCF's motion was directed at the entire complaint, and therefore, mandated dismissal of the entire complaint. (App. at 16).

The district judge who presided over this case for almost four years took the unprecedented step of addressing this error in his Order enacting the mandate. (App. at 56-60). The district judge observed that the Second Circuit's mandate " . . . dismissed the entire complaint, notwithstanding the fact that OCF's motion had been addressed *solely* to plaintiff's wrongful death *claim* and the fact that the caselaw relied upon by the panel . . . (citation omitted) . . . had concerned only a motion for *partial* summary judgment and had resulted only in the dismissal of the wrongful death claim and not the entire complaint." (App. at 57) (emphasis in original). He continued that:

> . . . in providing for the dismissal of the entire complaint rather than just the wrongful death claim, this mandate is clearly wrong and works a manifest injustice. The depth of this conviction is exceeded only by my fundamental faith in our system of appellate jurisprudence and in the ability of this Circuit Court, within which I have had the honor to serve for nearly ten years, to recognize that "justice is better than consistency," (citations omitted) and to do what is right. Confirmed in that faith, I issue this Order, but not without first respectfully making these comments. (App. at 59-60).

The district court noted that his belief that the mandate was in error was not based on the Second Circuit's interpretation of New York law, but rather " . . . by the failure of defendant OCF on appeal either to brief or even ask for dismissal of the entire complaint based on the revival statute." (App. at 59, 60, n.2).

Despite the comments of the trial judge, the Second Circuit, without opinion or comment, has denied all of petitioner's motions for relief. (App. at 62, 65). Thus, the Second Circuit has unjustly and unconstitutionally deprived petitioner of her Seventh Amendment right to trial by jury by dismissing plaintiff's valid jury verdict on her conscious pain and suffering claim and her spousal derivative action even though the legal basis asserted by the Court for this action applies only to petitioner's wrongful death claim.

The petitioner does not contend that Second Circuit erred in dismissing the wrongful death claim. Right or wrong, the legal issue decided by the Second Circuit

requires the dismissal of the wrongful death action. However, the Court of Appeals has asserted no legal basis for dismissing petitioner's conscious pain and suffering claims or her spousal derivative claim. By so doing, the Circuit Court has substituted it judgment of the facts for that of the jury in direct violation of the Seventh Amendment.

It is well established that the amount of damages is a factual issue for a jury to resolve not a legal issue within the province of a court. *Dimick v. Schiedt*, 293 U.S. 474, 478-479, 55 S.Ct. 296, 297-298, 79 L.Ed. 603 (1935). This jury resolved this factual issue in favor of the petitioner. By vacating the jury verdict on the petitioner's remaining claims without any legal justification for such an action, the Second Circuit has violated petitioner's Seventh Amendment right to a trial by jury.

The right to have a civil jury trial in actions at law is so precious that it will be scrupulously safeguarded by the Supreme Court. *Lyon v. Mutual Ben. Health & Acci. Asso.*, 305 U.S. 484, 492, 59 S.Ct 297, 300, 83 L.Ed. 303, *reh. den.* 306 U.S. 667, 83 L.Ed 1062, 59 S.Ct 459 (1939). The actions of the Second Circuit in this case are a direct affront to petitioner's Seventh Amendment right warranting a grant of certiorari by this Court.

CONCLUSION

In mandating the dismissal of petitioner's entire complaint rather than just the wrongful death claim, the Second Circuit has deprived petitioner of a valid jury verdict and has violated her Seventh Amendment right to

trial by jury. The right to a trial by jury is a precious right the violation of which warrants action by this Court. It is respectfully urged that the Court grant this petition and set the case for argument.

January 7, 1992

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1230, 1231 August Term, 1990

(Argued April 18, 1991 Decided August 8, 1991)

Docket Nos. 90-9062, 90-9132

PAULINE KULZER, as Executrix of the Estate of RICHARD KULZER, Deceased,

Plaintiff-Appellee,

v.

PITTSBURGH-CORNING CORP.; EAGLE-PICHER INDUSTRIES, INC.; OWENS-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS, INC.; THE CELOTEX CORPORATION; RAYMARK INDUSTRIES, INC.; AMCHEM PRODUCTS, INC.; GAF CORP.; ARMSTRONG WORLD INDUSTRIES; UNITED STATES GYPSUM CO.; H.K. PORTER COMPANY, INC.; NICOLET, INC.; CAREY CANADA, INC.,

Defendants,

OWENS-CORNING FIBERGLAS CORP.,

Defendant-Appellant-Cross-Appellee,

MANVILLE CORPORATION ASBESTOS DISEASE COMP. FUND,

Third-Party-Defendant-Appellee-Cross-Appellant.

Before: MESKILL, PRATT and WALKER, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Western District of New York, Telesca, J., following a jury trial, finding defendant and third-

party defendant liable for the wrongful death of plaintiff's husband.

Reversed and remanded. Judge Pratt dissents in a separate opinion.

FRANKLIN B. VELIE, New York City (Maria T. Galeno, Janis G. White, Suzanne Spector, Christy & Viener, New York City, Damon & Moray, Buffalo, NY, of counsel), *for Appellant Owens-Corning Fiberglas Corp.*

MICHAEL YOELI, New York City (David Henry Sculnick, John J. Laden, Gordon & Silber, New York City, of counsel), *for Appellant Manville Corporation Asbestos Disease Compensation Fund.*

STEPHEN G. SCHWARZ, Rochester, NY (Matthew F. Belanger, Faraci, Guadagnino, Lange & Johns, Rochester, NY, of counsel), *for Appellee.*

MESKILL, *Circuit Judge:*

The dispositive question raised on appeal is whether this wrongful death action falls within an exception to section 4 of the New York Toxic Tort Reform Act of 1986, Ch. 682, § 4, *reprinted in* 1 McKinney's Session Laws of New York 1567 (1986) ("revival statute" or "statute"). Plaintiff Pauline Kulzer (plaintiff) brought this wrongful death action under the revival statute on behalf of her deceased husband Richard Kulzer (Kulzer) in the United States District Court for the Western District of New

York, Telesca, J. One of the defenses raised by appellant Owens-Corning Fiberglas Corporation (OCF) was that an exception to the statute prevented plaintiff from reviving her husband's claim and that the action therefore was barred by the applicable statute of limitations. The district court rejected OCF's defense on two grounds. It first held that OCF had waived this defense. It then held that the exception did not apply to this case. Because neither rationale comports with our holdings in *Santos v. District Council of New York City*, 619 F.2d 963, 967 (2d Cir. 1980), or *Monte v. National Gypsum Co.*, 921 F.2d 405 (2d Cir. 1990), and because OCF's motion for a directed verdict should have been granted, we reverse and remand with instructions to dismiss the complaint.

BACKGROUND

Richard Kulzar worked for the Eastman Kodak Company from January 1947 to July 1980. Throughout this time he was exposed in varying degrees to asbestos and asbestos-containing products produced by a wide array of corporations. Of particular importance to this appeal, he was exposed to Kaylo, an asbestos-containing insulator manufactured by OCF, and to asbestos produced by the Manville Corporation, which is now represented by the third-party defendant and cross-appellant Manville Corporation Asbestos Disease Compensation Fund (Manville). Kulzer worked directly with Kaylo as an insulator for Kodak from the early 1950s until the early 1970s. In approximately 1971, Kodak promoted Kulzer to a supervisory position, called a "load man." In that capacity Kulzer continued to work with pipe insulation incurring further, although less significant, exposure to asbestos. In

January 1977, Kulzer was promoted again, to crew foreman. While his exposure to asbestos diminished further in this capacity, the allegations in plaintiff's complaint as well as the evidence adduced at trial showed that as a foreman Kulzer continued to be exposed to asbestos.

In July 1980, Kulzer was diagnosed with mesothelioma, a form of cancer linked to asbestos exposure. He retired from Kodak that month. He did approximately one year later, on August 31, 1981.

Kulzer's wife filed a workers' compensation claim on January 25, 1982, alleging mesothelioma secondary to asbestos exposure. More than five years later, on April 28, 1987, she filed this diversity action in the Western District of New York. She alleged that OCF, Johns-Manville, and several other manufacturers produced or contributed to the production of asbestos-containing products, the exposure to which caused her husband's death. Plaintiff brought her claim during the one year time window provided by the revival statute for claims arising from the latent effects of exposure to asbestos.

Prior to trial plaintiff settled or discontinued with all of the defendants except OCF, Manville, Owens-Illinois, Inc., and Eagle-Picher Industries, Inc. The trial began on April 17, 1990. After the close of plaintiff's proof, OCF moved for a directed verdict, contending that plaintiff's claim was time barred due to an exception to the revival statute. Even though OCF had raised a statute of limitations defense in its answer, the district court found that OCF had waived the defense by failing to plead it more specifically or to give plaintiff sufficient notice of it through pretrial motions. The court also stated that OCF

was "estopped from raising [this defense] as it seeks to do, mid-way through the trial, after the plaintiff has closed her case." The court concluded:

> The defendants have simply waited too long and have brought this motion too late in this trial to benefit from a statute of limitations defense which was never effectively pleaded. . . . The motion for a directed verdict is denied. The jury will decide this case.

The trial proceeded. On May 8, 1990, the jury returned a verdict finding that none of the defendants sold or marketed defective products.

After the verdict plaintiff settled with Owens-Illinois and Eagle-Picher. She then made a motion for a new trial against OCF. By a decision and order dated July 5, 1990, the district court granted plaintiff's motion, finding the jury's determination "against the clear weight of the evidence" and accordingly setting aside the jury verdict.

During the interlude between the first and second trials, plaintiffs moved to amend her complaint to state that Kulzer's exposure to asbestos ceased after 1971. OCF simultaneously made a second motion to dismiss the complaint, again on the grounds that an exception to the revival statute applied. After the close of both parties' proof in the second trial, the court issued its decision on OCF's motion to dismiss. The court again found that OCF had waived its limitations defense because its answer failed to raise with sufficient specificity the inapplicability of the revival statute. As an alternative ground for its decision, the court rejected OCF's motion on the merits, finding that after Kulzer "became foreman his

duties drastically changed and he did not become meaningfully exposed to asbestos so it can be the proximate cause" of his death. With regard to plaintiff's motion to amend her complaint, the record shows no further discussion of it by the court. The court apparently never decided this particular motion.

On November 5, 1990, the jury returned a verdict in the second trial – this time in plaintiff's favor. The jury found OCF liable in the amount of $450,000 for wrongful death, $250,000 for conscious pain and suffering, $25,000 for plaintiff's derivative cause of action, and $21,468.25 for medical and burial expenses. The court added interest to the wrongful death award in the amount of $370,657.53, bringing the total award to $1,117,125.78. The jury apportioned 40 percent of the verdict to OCF, 25 percent to Manville, and the remaining 35 percent to the settling defendants.

On appeal from the judgment subsequently entered, OCF offers four general challenges: (1) the district court erred in denying its initial motion for a directed verdict and later motion to dismiss the complaint; (2) the district court improperly granted plaintiff's motion for a new trial; (3) certain evidentiary rulings, jury instructions and remarks by plaintiff's counsel deprived OCF of a fair (second) trial; and (4) the district court incorrectly calculated interest on the wrongful death award. Manville, in turn, cross-appeals, challenging the district court's award of prejudgment interest against it.

DISCUSSION

OCF attacks both pillars of the district court's denial of its motion for a directed verdict and motion to dismiss the complaint. OCF argues that it did not waive the right to assert a statute of limitations defense during either the first trial or prior to the second trial. It then claims that the district court applied the wrong standard for determining whether the revival statute applied and that, under the proper standard, its motions should have been granted.

A. *Waiver*

The district court based its findings of waiver on OCF's failure to pursue the limitations defense through pretrial motions, the "boilerplate" manner in which OCF raised the defense, and the dissimilarity between the limitations defense to which OCF pleaded and the one it made in its two motions. These rationales do not support the court's decisions.

In *Santos v. District Council of New York City*, 619 F.2d 963 (1980), we rejected similar arguments. We held that "[t]he statute of limitations defense need not be raised in a pre-answer motion. Rather, under Fed. R. Civ. P. 8(c), the statute of limitations constitutes an affirmative defense, to be asserted in a responsive pleading." *Id.* at 967. We also emphasized that the defense need not be articulated with any rigorous degree of specificity: "The defense is sufficiently raised for purposes of Rule 8 by its *bare assertion*. Identification of the particular statute relied upon, though helpful, is not required in the pleading." *Id.* (emphasis added). We concluded that assertion of the

defense in the defendant's answer, rather than in its prior motions for dismissal and summary judgment, was sufficient and timely. *Id.* In this case OCF's recitation of the defense met the minimal pleading requirements of *Santos*. OCF stated in its answer: "to the extent that the complaint herein and the claims made by plaintiff were not commenced within the time limited by law, the complaint is barred by the applicable statute of limitations."

Plaintiff now offers an alternative argument for salvaging the district court's waiver decisions. She claims that the revival statute is not technically a statute of limitations, but a condition precedent to relief, the exceptions to which must be pleaded specifically. This argument is equally unavailing. First, if an exception to the revival statute applies, then the action is indeed barred by the relevant statute of limitations. Here, if the revival statute does not restore plaintiff's claim, then N.Y. Est. Powers & Trusts Law (hereinafter EPTL) § 5-4.1 (McKinney 1981), which authorizes a decedent's representative to bring a claim within two years of the decedent's death, bars the claim. *See Monte*, 921 F.2d at 406 (dismissing under the statute of limitations a claim not restored by the revival statute); *In Re Joint Eastern & Southern Dist. Asbestos Litigation*, 756 F.Supp. 794, 798 (S.D.N.Y. 1991) (same). Second, even if the revival statute is treated as a condition of relief – in effect, an element of plaintiff's claim – we are not convinced that OCF should bear the requirement of pleading the defense with particularity. Plaintiff has cited no authority or provided any persuasive rationale why this should be so. Moreover, this construction of OCF's defense makes OCF's motion more akin to a motion for failure to state a claim upon which

relief can be granted. Because such a motion can be made at the trial on the merits (as indeed OCF's first motion was), *see* Fed. R. Civ. P. 12(h)(2), this reconfiguration of OCF's defense by plaintiff is also unhelpful.

The assertion of a limitations defense in the answer preserved OCF's right to raise the defense both during the first trial and before the second. Estoppel does not apply here.

B. *Application of the Revival Statute*

We now turn to the merits of OCF's two motions. OCF submits that the revival statute does not restore plaintiff's claim and it thus should be dismissed under the applicable statute of limitations. We agree.

The revival statute reads in pertinent part:

> § 4. Notwithstanding any other provision of law . . . , every action for personal injury, injury to property or death caused by the latent effects of exposure to diethylstilbestrol, tungsten-carbide, asbestos, chlordane or polyvinyl-chloride upon or within the body or upon or within property which is barred as of the effective date of this act or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act; *provided, however, that this section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which was not barred as of the date of the decedent's*

> *death and could have been brought pursuant to section 5-4.1 of the estates, powers and trust law,* and provided, further that for any revived claim or action, including third party claims and claims for contribution pursuant to article fourteen of the civil practice law and rules for which a notice of claim is or would have been required by law as a condition precedent to the claim or action, a notice of claim shall not be required.

(emphasis added). The statute gives claimants an opportunity to revive time-barred tort claims arising from the latent effects of exposure to toxic materials. No one disputes that plaintiff met the initial requisites for bringing a claim under the statute: she brought this action within the applicable one year time period; the claim arose from exposure to asbestos; and the claim was time barred as of July 1, 1986, the effective date of the statute. Disagreement focuses instead on whether the italicized exception to the statute applies. Under the exception those actions that were not barred as of the date of decedent's death and could have been brought by decedent's representative under EPTL § 5-4.1, *i.e.*, within two years of his death, may not be revived.

The exception requires a retrospective inquiry. We must revisit August 31, 1981, the date of Kulzer's death, and determine whether on that day a cause of action arising from his death would have been time-barred. At that time, there was a three year statute of limitations applicable to personal injury actions. *See* N.Y. C.P.L.R. § 214(5). Also at that time, a cause of action for exposure to toxic substances accrued on the last date of exposure to the toxic substance. *See, e.g., Monte*, 921 F.2d at 407 (citing *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 446

N.Y.S.2d 244, 430 N.E.2d 1297 (1981), *cert. denied*, 456 U.S. 967 (1982); *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936)). Incorporating the above limitations period and the rule of accrual applicable on the date of Kulzer's death, the revival statute asks: Did Kulzer incur employment-related exposure to asbestos after August 31, 1978, in other words, within three years of his death? The district court answered this question in the negative, holding as a matter of law that when Kulzer "became foreman [in January 1977] his duties drastically changed and he did not become meaningfully exposed to asbestos so it can be the proximate cause" of his death.

The district court's application of the revival statute conflicts with our recent holding in *Monte*. There a lawsuit was brought under the revival statute on behalf of a decedent who was exposed to asbestos from 1938 through June 1945 and who died from asbestosis on November 26, 1947. Because the decedent's exposure continued within three years of his death, we affirmed the district court's grant of summary judgment dismissing the complaint. Of particular significance to this case, we observed in *Monte* that there was no linkage between the accrual of a cause of action – the last date of exposure – and causation. We considered and rejected the argument that "it would have been impossible for [the decedent's representative] to commence a wrongful death action because she could not have alleged . . . that a few months of exposure had proximately caused decedent's death or shortened his life." 921 F.2d at 407. Thus, in *Monte*, even though only six months of the decedent's lengthy exposure occurred during the three year period before his death, we held that the exception to the revival statute applied and we

barred a claim brought on his behalf because the "last exposure was within three years of his death." *Id.*

As *Monte* makes clear, the revival statute does not alter the last date of exposure rule. It instead takes aim at the perceived inequities created by the New York courts' and legislature's reluctance in adopting a "discovery" rule for ascertaining when a cause of action for a long-tail disease like asbestosis accrues. *Cf.* N.Y. C.P.L.R. § 214-C ("discovery" rule enacted in 1986). The purpose of the revival statute is to provide relief where the "latent effects of such exposure did not manifest themselves until many years after the date of last exposure." *Monte*, 921 F.2d at 408. For that reason the statute excludes claims that were not time-barred on the date of the decedent's death. Claims that could have been brought, because exposure continued within three years of death, lack the latency problem the statute sought to cure and thus are excepted from the statute's coverage. Since the last date of exposure rule remains intact, the application of the exception to the revival statute does not turn, as the district court held it did, on whether the decedent's last exposure(s) proximately caused his death. For this reason, as long as the decedent's employment-related exposure continued for as little as one day within the three year period preceding death, the statutory exception would apply, even though that one day of exposure came too late to have significant impact on the preceding cumulative effect of the decedent's exposure.

The district court did not apply the exception to the revival statute in conformity with our recent holding in *Monte*. It improperly linked accrual with causation.

Accordingly, its decision to reject OCF's motion to dismiss on this ground was error.

We also conclude that under the current application of the revival statute OCF's motion for a directed verdict should have been granted. Parenthetically, our analysis of this question proceeds in the context of the evidence presented at the first trial; the exception was raised in OCF's motion for a directed verdict during the first trial and we assess it in that context.

In spite of Kulzer's diminishing exposure to asbestos during the 1970s, there is no material dispute that Kulzer *was* exposed to asbestos after August 31, 1978. Plaintiff claimed that her husband was so exposed in her complaint:

> 20. Plaintiff's decedent was employed by Eastman Kodak Company ("Kodak") of Rochester, New York as a pipe coverer from the time of his initial employment in January of 1947 until his total disability from employment in July of 1980.
>
> 21. *At all times herein,* while working in his employment with Kodak, plaintiff's decedent used and was exposed to the asbestos and asbestos products of the defendant corporations and each of them.
>
> 22. *At all times herein,* plaintiff's decedent's use and exposure to the defendant corporations' asbestos and asbestos products caused him to inhale and ingest asbestos fibers, particles and dust from defendant corporations' asbestos and asbestos products.
>
> 23. As a result of working with and being exposed to the asbestos and asbestos products

> of the defendant corporations and each of them, plaintiff's decedent contracted an asbestos caused disease, mesothelioma, and other asbestos caused conditions.

(emphasis added). It is difficult to see why plaintiff should not be bound by her judicial admissions. The exception to the revival statute plainly appears in the one paragraph statute and directly follows the language that grants a one year opportunity to revive time-barred claims. Moreover, the complaint, like any other pleading, subjects both client and attorney to the truth-inducing sanctions of Rule 11. *See* Fed. R. Civ. P. 11 ("[t]he signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact").

We might be less exacting if this were a trifling error in pleading. But it is not. Plaintiff asks us to disregard what may be the most critical component of a complaint brought under this statute – the facts bearing on whether the cause of action may be revived. Placed in this light, plaintiff's current stance has the ring of expediency to it. She offers no explanation for the pleading and she did not seek to amend the pleading until three years later, after the first trial had ended. *See In re Joint Eastern & Southern Dist. Asbestos Litigation*, 756 F.Supp. at 797 (rejecting attempt to modify answers to interrogatories, which had been made two and one-half years earlier and which admitted asbestos exposure within three years of death, and dismissing plaintiff's revival statute claim).

Our decision to dismiss the action on the basis of the exception to the revival statute is fortified by *other* evidence presented at the first trial. Medical evidence and the testimony of Kulzer's co-workers demonstrated that Kulzer continued to be exposed to asbestos after August 31, 1978. A July 7, 1980 Genesee Hospital record confirms that Kulzer "was promoted to a supervisory role in 1971 but continues working directly [with] insulation material." Kenneth Hart, a co-worker of Kulzer's, testified that he and his crew, including Kulzer as crew foreman, ripped out old asbestos insulation at least through 1979 and that the paper masks worn by the employees did not keep out all of the dust. Another co-worker, William Helm, testified that asbestos removal continued through the 1978-1980 period and, as a foreman during that period, Kulzer was exposed to asbestos during his regular visits to the job sites. In her appellate brief, plaintiff implicitly acknowledges that Kulzer's promotion to foreman did not remove him completely from direct contact with his crew and their environment: "As foreman [Kulzer] no longer worked covering pipes or in the field at all except occasionally to check on the workers under him." In sum, evidence showed that Kulzer's promotions did not completely remove him from employment-related asbestos exposure.

Measured against the above evidence and, most importantly, plaintiff's admissions in her complaint, OCF's initial motion for a directed verdict should have been granted. That this is the proper resolution of the action becomes even clearer if we place ourselves in the shoes of a court confronted with a claim brought on Kulzer's behalf within two years of his death. Consider,

for example, if plaintiff had brought a wrongful death claim on August 30, 1983, to which the defendant had asserted a limitations defense. The court would have had before it evidence of some job-related exposure during the three year period before death and a *defendant's* judicial admission that such exposure occurred. Under those circumstances, there can be little doubt that the court would have flatly rejected a limitations defense. Because the revival statute requires us to ask and answer this very question, all the while leaving the last date of exposure rule unchanged, we are compelled to reverse the judgment and to direct that the complaint be dismissed.

Plaintiff's other argument merits only brief attention. Contrary to plaintiff's assertions, the factual allegations in the complaint and the second jury's finding that OCF was responsible for 40 percent of Kulzer's exposure also show that Kulzer was exposed to OCF's product, Kaylo, during the three years before his death.

Given our disposition of OCF's motion for a directed verdict, we need not reach the merits of OCF's other arguments or of Manville's cross-appeal.

CONCLUSION

Accordingly, the district court's judgment is reversed and this matter is remanded to the district court with instructions to dismiss the complaint.

Kulzer v. Pittsburgh-Corning Corp.
Nos. 90-9062, 90-9132

PRATT, *Circuit Judge*, dissenting:

When Richard Kulzer became a foreman in January 1977, "his duties drastically changed and he did not become meaningfully exposed to asbestos so it can be the proximate cause" of his injury. This finding of fact by Judge Telesca is not challenged as, nor is it, a clearly-erroneous finding. Fed. R. Civ. P. 52(a). The majority, however, denies Pauline Kulzer her cause of action because her husband was exposed, within three years of his death, to *some* asbestos – despite the fact that that exposure did not cause his death. This result is unjust and contrary to New York law.

First, the majority engages in a strained application of *Monte v. National Gypsum Co.*, 921 F.2d 405 (2d Cir. 1990), a factually-inapposite case. In *Monte*, the plaintiff attempted to avail herself of the toxic tort revival statute by arguing "that most of her husband's exposure to asbestos occurred * * * more than three years before his death and that the bulk of the exposure occurred outside of the" statute of limitations for wrongful death actions. *Id.* at 407. We dismissed the plaintiff's argument that a 1947 court would have considered her husband's injury "complete" prior to the three-year limitation period, reasoning that "whether effects of exposure to toxic substances are cumulative, and to what extent, are fact issues" generally requiring medical proof. *Id.* at 408. In *Monte*, the decedent's exposure was continuous and undistinguishable; here, the decedent's exposure was sporadic and distinguishable. More importantly, in *Monte*

there was no factual finding that the later exposures did not cause the injury; here, of course, there was.

Second, the majority ignores the fact that "causation" permeates the language of the revival statute: "[E]very action for personal injury, injury to property or death *caused by the latent effects of exposure* to [asbestos] which is barred as of the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived". Toxic Tort Reform Act of 1986, ch. 682, § 4 (emphasis added). The majority in effect concedes this when it explains that the revival statute "gives claimants an opportunity to revive time-barred tort claims *arising from* the latent *effects* of exposure to toxic materials." (emphasis added).

Third, the majority's opinion misinterprets the rule of accrual that was applicable on the date of Richard Kulzer's death. The "date of last exposure" rule, which had its genesis in *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936), has always – until today – required that the "last exposure" be a proximate cause of the injury. *See, e.g., Schmidt*, 270 N.Y. at 300, 200 N.E. at 827 ("There can be no doubt that a cause of action accrues only when the forces wrongfully put in motion *produce* injury.") (emphasis added); *Wright v. Carter Prods.*, 244 F.2d 53, 63 (2d Cir. 1957) (cause of action accrues on date of application which "proximately caused" plaintiff's affliction); *Lindsay v. Ortho Pharmaceutical Corp.*, 637 F.2d 87, 95 (2d Cir. 1980) ("Any damages *resulting from* a specific ingestion must be sued for within three years.") (emphasis added).

Finally, the majority's approach to accrual disregards a principle of tort law so basic that it can barely even be called, "hornbook law". A tort is comprised of (1) breach of a legally-imposed duty, and (2) an injury proximately caused by that breach. *See generally* W. Keeton, *Prosser & Keeton on the Law of Torts* § 1, at 1-7 (5th ed. 1984) (section entitled "What are Torts?"); 4 F. Harper, F. James & O. Gray, *The Law of Torts* § 20.1, at 85 (2d ed. 1986) ("the requisite causal connection is therefore an element of plaintiff's cause of action"); *see also Black's Law Dictionary* 1335 (5th ed. 1979) (elements of "every tort action" are existence of legal duty, breach of duty, "and damage as a proximate result"). Causation is a part of every action sounding in tort.

Judge Telesca found that Richard Kulzer's post-1977 exposures to asbestos did not contribute to his death; they were thus not part of his cause of action. In my view, he was correct. In January 1977, when Richard Kulzer last inhaled an injury-causing asbestos fiber, his cause of action accrued. The statute of limitations ran out in January 1980. His cause of action was thus "barred as of the effective date of" the revival statute, July 30, 1986, and therefore merited revival. Since the majority reaches a result profoundly contrary to the equitable goals of the revival statute, and contrary to New York law, I dissent.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAULINE KULZER, as Executrix of the Estate of RICHARD KULZER, Deceased,

Plaintiff,

v.

CIV-87-0386T

PITTSBURGH-CORNING CORPORATION, EAGLE-PICHER INDUSTRIES, INC., OWENS-CORNING FIBERGLAS CORPORATION, OWENS-ILLINOIS, INC., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., a/k/a RAYBESTOS-MANHATTAN, INC., AMCHEM PRODUCTS, INC., GAF CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., UNITED STATES GYPSUM CO., H.K. PORTER COMPANY, NICOLET, INC., individually and as successor to KEASBEY & MATTISON CORP., CAREY CANADA, INC. a/k/a CAREY CANADIAN MINES, LTD.,

DECISION and ORDER

Defendants.

Defendants' Motions Pursuant to Federal Rule of Civil Procedure 50(a)

Upon completion of the plaintiff's case on the morning of April 30, 1990, defendants made various motions for directed verdict pursuant to Federal Rule of Civil

Procedure 50(a). For the reasons discussed briefly below, all such motions are denied.

1. Motion of Owens-Illinois, Inc. for a Directed Verdict

Defendant Owens-Illinois moves for a directed verdict stating that plaintiff has failed to introduce sufficient product identification evidence as to Owens-Illinois' Kaylo asbestos products to warrant submission of the case to the jury. Owens-Illinois acknowledges that Kodak purchased substantial amounts of its asbestos products during the years that Mr. Kulzer was employed there; it argues, however, that no "live" testimony directly establishes that Mr. Kulzer was exposed to Kaylo during the years (1953-1958) that it was being produced by Owens-Illinois.

As plaintiff's counsel pointed out on oral argument, the Second Circuit does not hold a plaintiff to such a rigid standard of product identification. *See Johnson v. Celotex*, 89-7484 (2d Cir. Mar. 20, 1990). Accordingly, Owens-Illinois' motion is denied.

2. Motion of Eagle-Picher Industries, Inc. for a Directed Verdict

Defendant Eagle-Picher has moved for a directed verdict, stating that plaintiff has failed to introduce expert testimony that asbestos fibers of the type manufactured by Eagle-Picher, that is chrysotile asbestos fibers, caused plaintiff's mesothelioma. In support of its motion, Eagle-Picher cites the expert testimony of Dr. Abraham.

While Dr. Abraham testified that an examination of Mr. Kulzer's tissue samples indicated only low levels of chrysotile asbestos, plaintiff adduced other testimony indicating that plaintiff *was* exposed to chrysotile asbestos before he developed asbestosis. Furthermore, the testimony of another expert, Dr. Holstein, concerning the cause of Mr. Kulzer's mesothelioma was not so "fiber specific."

This evidence simply does not support a directed verdict in favor of Eagle-Picher; the jury shall decide both the significance and the weight to be accorded the testimony of the various experts Accordingly, the motion of Eagle-Picher is denied.

3. Motion of Owens-Corning Fiberglas Corporation

Finally, I address the first motion made by a defendant after close of the plaintiff's proof. Defendant Owens-Corning Fiberglas ("OCF") moved to dismiss plaintiff's wrongful death claim, a motion in which all the other defendants joined. The gist of OCF's motion is that the testimony establishes Mr. Kulzer's exposure to asbestos dust throughout his employment at Kodak, including the years 1978-1980. (In 1980, of course, Mr. Kulzer was forced to retire because of his ill health; he died in August 1981.) OCF argues that, since Mr. Kulzer was exposed to asbestos products within three years of the date of death, his claim was not time barred at the time of his death, and is subject to the two-year statute of limitations applicable to New York's wrongful death statute. OCF argues that an action on behalf of Mr. Kulzer may not be brought under New York's revival statute, § 4

of the 1986 New York Tort Reform Act, which provided a one-year period during which plaintiffs could bring previously time-barred claims for personal injury or death arising from exposure to asbestos. The revival statute itself provides that

> This section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which was not barred as of the date of the decedent's death and could have been brought pursuant to § 5-4.1 of the Estates, Powers and Trust Law. . . . 1986 N.Y. Laws, ch. 682, § 4.

OCF makes this motion after extensive discovery, extensive settlement negotiations involving both the parties and the Court, a pre-trial conference, and an entire week of trial at the end of which the plaintiff rested her case. This motion, however, relies on facts which were stated by the plaintiff in her *original complaint, filed almost three years ago to the day.* In that complaint, at ¶ 20, plaintiff states that her husband, Richard Kulzer,

> was employed by Eastman Kodak Company ("Kodak") of Rochester, New York as a pipe coverer from the time of his initial employment in January of 1947 until his total disability from employment in July of 1980.

Paragraph 21 of the complaint continues:

> *At all times herein,* while working in his employment with Kodak, plaintiff's decedent used and was exposed to the asbestos and asbestos products of the defendant corporations and each of them.

Paragraph 22:

> At all times herein, plaintiff's decedent's use and exposure to the defendant corporations' asbestos and asbestos products caused him to inhale and ingest asbestos fibers, particles and dust from defendant corporations' asbestos and asbestos products.

Paragraph 23:

> As a result of working with and being exposed to the asbestos and asbestos products of the defendant corporations and each of them, plaintiff's decedent contracted an asbestos-caused disease, mesothelioma, and other asbestos-caused conditions.

Thus, defendants have been on notice since the inception of this case that plaintiff alleges an exposure to asbestos products throughout Mr. Kulzer's working years, 1947-1980.

My review of this case fails to indicate any way whatsoever in which any defendant raised any defense to the action remotely similar to the arguments now advanced by OCF and eagerly adopted by the other defendants. Admittedly, each of those defendants who has seen fit to file an answer has raised the statute-of-limitations affirmative defense which has become virtual boilerplate among asbestos defendants, namely, that the actions are time barred and that the attempt of the New York State Legislature to revive them is unconstitutional. The constitutionality of the revival statute is well established, *Hymowitz v. Lilly and Co.*, 73 N.Y.2d 487, 513-14, *cert. denied*, 110 S. Ct. 350 (1989), at least in the highly analogous context of DES cases. Such a generically stated

affirmative defense, never pursued through pre-trial motions to dismiss or for summary judgment, certainly did not provide the plaintiff with notice of the arguments posited by OCF in support of its present motion for a directed verdict.

Neither OCF nor any other defendant moved prior to trial to amend its answer to plead the statute of limitations defense which underlies this motion. Fed. R. Civ. P. 15(a). As stated previously, the facts which support this motion have been in issue since the filing of the complaint in 1987; defendants cannot justify this motion as an attempt to conform the pleadings to the evidence, *cf.* Fed. R. Civ. P. 15(b). Thus, I consider that OCF has waived the statute of limitations defense which it now advances. Fed. R. Civ. P. 12(b), 8(c).

Even if I did not find such a defense irrevocably waived, I would find OCF estopped from raising it as it seeks to do, mid-way through the trial, after the plaintiff has closed her case. While OCF has eagerly proffered cases to this Court in which either a New York court or another district court within this Circuit has dismissed a plaintiff's wrongful death claim on the basis of a similar argument, none of these cases is procedurally apposite. In *Green v. Abbott Labs*, 137 Misc.2d 424 (N.Y. Sup. Ct. 1987), *aff'd*, 148 A.D.2d 403 (1st Dep't 1989), the trial court granted a motion to dismiss the wrongful death claim in November 1987, just five months after the commencement of the action. In *In re Joint Eastern and Southern District Asbestos Litigation, re: Cassese*, CIV-88-1918 (S.D.N.Y.) (E.D.N.Y. Dec. 29, 1989), *available at* 1989 WL 162781, Judge Sifton granted a motion for partial summary judgment based on a fully developed record. A

review of that decision indicates that this exact issue was hotly contested and fully litigated, complete with relevant expert testimony concerning the degree to which plaintiff's decedent's exposure to asbestos products within three years of his death contributed to his asbestos-related disease. *See also In re Joint Eastern and Southern Districts Asbestos Litigation, re: Anderson,* Civ-87-4567 and *Oefelein,* Civ-87-4279 (S.D.N.Y., E.D.N.Y. Dec. 1989) (Dismissal granted on motion for summary judgment).

In this case, the first mention defendants made of this intriguing argument came after plaintiff closed her proof, after her experts had reviewed all the evidence in this file and had testified accordingly.

In view of the above I need not address the substantive merits of OCF's motion for a directed verdict, notwithstanding the submissions of both parties. The defendants have simply waited too long and have brought this motion too late in this trial to benefit from a statute of limitations defense which was never effectively pleaded. I have had occasion to say it before and, sadly, it appears I have occasion to say it again: the spirit and the purpose of the Federal Rules of Civil Procedure which govern our trial practice will not tolerate trial by surprise. Neither will this Court. The motion for a directed verdict is denied. The jury will decide this case.

ALL OF THE ABOVE IS SO ORDERED.

/s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
May 1, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAULINE KULZER, as
Executrix of the Estate of
RICHARD KULZER, deceased,

Plaintiff,

v.

OWENS-CORNING FIBERGLAS
CORPORATION,

Defendant.

CIV-87-0386T

DECISION
and ORDER

INTRODUCTION

In an action commenced April 29, 1987, the plaintiff, Pauline Kulzer, in her representative capacity as executrix of the estate of her husband Richard Kulzer, seeks recovery for damages from the defendants, claiming that her husband's illness and ultimate death resulted from exposure to asbestos-containing products manufactured by defendants, of whose dangers the defendants had failed to provide warning. Extensive discovery took place[1]; various defendants either settled out or were dismissed from the case prior to trial; and a jury trial commenced April 17, 1990, against defendants Eagle-Picher Industries, Inc. ("Eagle-Picher"), Owens-Corning Fiberglas Corporation

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[1] This case is one of more than 400 asbestos-related cases in the Western District Asbestos Litigation ("WDAL") and pretrial procedure was subject to the applicable case management orders.

("OCF"), and Owens-Illinois, Inc. ("Owens-Illinois"), as well as against a third-party defendant, the Manville Personal Injury Settlement Trust (the "Manville Trust")[2].

During the trial, the jury heard live testimony of various witnesses – including plaintiff, her husband's treating physicians, co-workers of Richard Kulzer, and medical and economic experts – and extensive deposition testimony. At the end of ten days of proof, which included complex scientific expert testimony, the jury began deliberating May 7, 1990 and returned a verdict of no cause for action May 8, 1990. At the commencement of deliberations, the jury had requested to have all of the exhibits in the jury room with them, but throughout their deliberations for 1½ days, neither requested to have any testimony read to them nor submitted any questions for instruction to the Court. In reaching its verdict, the jury answered only the first three questions on a six-page jury verdict form, determining only that the asbestos-containing products manufactured by each of the defendants were not defective.

For the reasons discussed briefly below, plaintiff's motion for a new trial is granted.

PLAINTIFF'S MOTION FOR A NEW TRIAL

Plaintiffs moves for a new trial[3] pursuant to Fed. R. Civ. P. 59, stating that the jury's verdict is against the

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[2] The Manville Trust appears in WDAL actions on behalf of the Johns Manville Corporation.

[3] Subsequent to entry of judgment pursuant to the jury's verdict, plaintiff has settled this action with defendants Eagle-

(Continued on following page)

clear weight of the evidence and constitutes a miscarriage of justice. In support of the motion, plaintiff argues that the clear weight of the evidence establishes that defendants' asbestos-containing products were defective throughout the period during which Mr. Kulzer was exposed to them in his employment at Eastman Kodak Company from the late 1940s to the early 1970s. Plaintiff cites to evidence indicating that, during the relevant period, defendants knew that exposure to asbestos-containing products could cause illness and even death and that they nevertheless failed to provide any warnings or instructions to either purchasers or users of their products until the mid-1960s.

Plaintiff argues that the evidence of the knowledge of defendant OCF concerning the dangers of its asbestos-containing products is particularly compelling: OCF had developed a plan as early as the 1940s to create a market for its competing fiberglass products by informing workers of the hazards of working with asbestos. (Plaintiff's Exhibit 165.) Other evidence indicates that OCF was both informed, and acknowledged, that asbestos was a factor in causing cancer as well as asbestosis in workers exposed to it. (Plaintiff's Exhibits 4314 and 556.) A 1963 OCF internal memo states: "Asbestos (as found in Kaylo [OCF's asbestos-containing product]) when breathed into the lungs causes asbestosis which often leads to lung cancer." (Plaintiff's Exhibit 556.)

(Continued from previous page)

Picher and Owens-Illinois as well as with the Manville Trust. Consequently, plaintiff moves for a new trial only as to defendant OCF.

In spite of the then-growing body of scientific knowledge concerning the hazards of asbestos and the regulation of exposure levels mandated by various states, OCF did not place caution labels on its asbestos-containing product, Kaylo, until almost two years after other asbestos manufacturers had begun placing such warnings on their asbestos-containing products. (Plaintiff's Exhibit 569.)

OCF'S OPPOSITION TO THIS MOTION

In opposition to the motion for a new trial, OCF refers to various testimony and exhibits which, it argues, support the jury's verdict. OCF points out that the jury was informed that, as of 1938, the United States Surgeon General had determined that exposure to asbestos dust could be limited so as to make asbestos-related industrial disease a thing of the past; that the results of a definitive study of the health hazards of exposure to asbestos-containing products were not generally available until the end of 1965, less than one year before OCF began to attach warning labels to Kaylo; and that OCF's failure to warn was reasonable given the special circumstances of Kaylo, which contained only a small amount of asbestos in an encapsulated form and was not as dusty as other asbestos-containing products.

OCF's essential argument in opposing this motion is that "overwhelming" evidence in the record justifies a jury's finding that it was reasonable for OCF, at the time it manufactured Kaylo, to consider that the regulatory scheme – in place during the years 1946-1968 and aimed at limiting workers' exposure to asbestos-containing

products – was sufficient to assure its product's safe use in the workplace, and that no further warning by the manufacturer was necessary.

THE PROOF AT TRIAL

Undisputed evidence established that Richard Kulzer was exposed during his employment at Eastman Kodak Company from the late 1940s to the early 1970s to the asbestos-containing products of each of the defendants, including OCF. Further evidence established that Richard Kulzer contracted asbestosis and, later, mesothelioma, of which he ultimately died, and that mesothelioma is a form of cancer exclusively associated with exposure to asbestos. Uncontroverted proof established that, during the greater part of Richard Kulzer's exposure to defendants' asbestos-containing products, defendants placed absolutely no warning upon either their products or their packaging, nor did they provide any warning literature to either their own customers, such as Eastman Kodak Company, or to the ultimate users of their products, such as Richard Kulzer. In addition to this uncontroverted evidence, there is substantial evidence in the record indicating that the defendants, including OCF, had actual knowledge of the dangers of their products for years and even decades before they finally decided to provide a warning thereof to customers.

In trying to fathom the jury's verdict in this case, I am drawn back to OCF's argument, made initially in counsel's opening statement, repeated in his closing, and raised once again in opposition to this motion, that OCF reasonably relied on the established threshold limit

values ("TLVs") imposed by state regulation to set safe levels of exposure to asbestos-containing products such as Kaylo, and that reliance thereon obviated the need for any further warning concerning the dangers of its product. Having presided at this trial, having heard the testimony of all the witnesses, both the expert and non-expert and having reviewed all of the exhibits which were made available to the jury, I find this argument the sole justification for the jury's verdict and, because I find it both unsupported by the weight of evidence in the trial and erroneous, I must reject that argument and strike the verdict based upon it.

APPLICABLE LAW

Fed. R. Civ. P. 59(a) provides in relevant part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by a jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .

Case law firmly commits a motion for a new trial to the discretion of the district court. *Montgomery Ward and Co. v. Duncan*, 311 U.S. 243, 251, 61 S. Ct. 189, 194 (1940); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845, 850 (1984); *see also Fairmount Glass Works v. Cub Fork Coal Co.*, 298 U.S. 474, 481, 53 S. Ct. 252, 254 (1933); *Portman v. American Homes Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953); *Newmont Mines Ltd. v. Hanover Insurance Co.*, 784 F.2d 127, 133 (2d Cir. 1986).

> No rigid nor fixed formula can or should prescribe how this principle is to be universally applied. The trial court, which has a feel for the case, should apply the principle so that substantial justice is done on the facts of the individual case.

6A *Moore's Federal Practice* § 59.05[5], 59-50 – 59-51 (2d Ed. 1989), and cases cited therein.

I exercise this discretion in accordance with Fed. R. Civ. P. 61 which forbids disturbing a verdict on the basis of trial error "unless refusal to take such action appears to the court inconsistent with substantial justice." If, however, "one cannot say, with fair assurance, . . . that [a] judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos v. U.S.*, 328 U.S. 750, 765, 66 S. Ct. 1239, 1248 (1946), quoted in *Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983); *see also Charter v. Chleborad*, 551 F.2d 246, 249 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977).

Unlike a motion for judgment notwithstanding the verdict, a new trial motion may be granted even if there is substantial evidence to support the verdict. *Bevevino v. Saydjari*, 574 F.2d 676, 683 (2d Cir. 1978), *citing* 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2806 at 43 (1973). The trial judge is free to weigh the evidence himself and need not view it in the light most favor to the verdict winner. *Bevevino*, 574 F.2d at 684. While different courts have adopted varying standards to be applied by a trial court in passing on such a motion, the Second Circuit has consistently approved, see *e.g.*, *Bevevino*, 524 F.2d

at 684, the standard set forth in 6A *Moore's Federal Practice*, § 59.08[5], at 59-150 – 59-152 (1989) (footnotes omitted):

> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If the judge is convinced that there has been, then it is his duty to set the verdict aside; otherwise not.

Thus, a trial court should grant a motion for a new trial only when convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice. *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970 (2d Cir. 1987) (citations omitted).

Viewing the verdict in the overall setting of this two-week trial and considering the character of the extensive evidence, both testimonial and documentary, as well as the complexity of the medical, scientific, and historical data which the jury was required to absorb and the legal principles which they were bound to apply, I am convinced that the clear weight of the evidence establishes that OCF knew or should have known that its asbestos-containing product, Kaylo, was dangerous at the time OCF sold it to Eastman Kodak Company, and that OCF's failure to warn either its customers or its users of those dangers at any time prior to the mid-1960s rendered

Kaylo a defective product. Thus, the jury's contrary determination is against the clear weight of the evidence.

The clear weight of the evidence further establishes that exposure to Kaylo was a proximate cause of Richard Kulzer's illness, disability, and excruciating death. The jury was precluded from reaching this determination by its initial error in determining that Kaylo was not defective.

Concerns for rectitude and justice demand that the jury's error be corrected and its omission supplied; because my role as a trial judge means "more than to serve as a conduit between the jury and the Clerk's office for entry of judgment," *Compton v. Luckenbach Overseas Corp.*, 425 F.2d 1130, 1134 (2d Cir. 1970) (dissent), I grant this motion for a new trial.

WHEREFORE, plaintiff's motion for a new trial is granted; the verdict of the jury filed May 8, 1990 is set aside and the judgment filed. May 9, 1990 is hereby vacated. This case is assigned a trial date of October 2, 1990.

ALL OF THE ABOVE IS SO ORDERED.

/s/ Michael A. Telesca
MICHAEL A. TELESCA
United States
District Judge

DATED: Rochester, New York
July 5, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAULINE KULZER, as
Executrix of the Estate of
RICHARD KULZER,
Deceased,

CIV-87-0386T

Plaintiff,

- vs -

PITTSBURGH-CORNING
CORPORATION, et al.,

Defendants.

Take notice of an Order, of which the within is a copy, duly granted in the within entitled action on the 16th day of October, 1990 and entered in the office of the Clerk of the United States District Court, Western District of New York, on the 16th day of October, 1990.

Dated: Rochester, New York
October 16, 1990

Clerk
United States District Court
Western District of New York
282 U.S. Courthouse
Rochester, New York 14614

TO: S. Schwarz, Esq.
P. Marlette, Esq.
M. Yoeli, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAULINE KULZER, as Executrix of the Estate of RICHARD KULZER, Deceased,

Plaintiff,

v.

PITTSBURGH-CORNING CORPORATION, EAGLE-PICHER INDUSTRIES, INC., OWENS-CORNING FIBERGLAS CORPORATION, OWENS-ILLINOIS, INC., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., a/k/a RAYBESTOS-MANHATTAN, INC., AMCHEM PRODUCTS, INC., GAF CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., UNITED STATES GYPSUM CO., H.K. PORTER COMPANY, NICOLET, INC., individually and as successor to KEASBEY & MATTISON CORP., CAREY CANADA, INC. a/k/a CAREY CANADIAN MINES, LTD.,

Defendants.

CIV-87-0386T

ORDER

This asbestos-related wrongful death action is scheduled for trial in this Court October 24, 1990. The parties have filed various pre-trial motions: plaintiff's motion to

amend the complaint, defendant OCF's motion to dismiss plaintiff's wrongful death claim, and the motion of the Manville Corporation Asbestos Disease Compensation Fund (the "Manville Trust") to strike any complaint stating a direct cause of action against it.

For the reasons discussed briefly below, determination of the motions of plaintiff and of defendant OCF is deferred until trial and the motion of Manville Trust is granted.

Plaintiff's Motion to Amend Complaint

Plaintiff requests leave to make three amendments to the complaint, to (i) allege that her husband's exposure to respirable asbestos ended in 1971 and not in 1980 as alleged in the original complaint, (ii) bring a direct action against the Manville Trust, and (iii) eliminate from the caption those defendants who are no longer present in the case.

Insofar as plaintiff seeks to amend the caption of this action, her motion is granted; such amendment constitutes no undue prejudice to the remaining defendants who is not precluded from introducing appropriate evidence concerning former defendants in the case.

Insofar as plaintiff seeks to bring a direct action against the Manville Trust, her motion is denied and the complaint against the Manville Trust, filed August 23, 1990, is stricken. After review of the parties' papers and of the relevant jurisdictional statutes, I cannot say with certainty that this Court would have jurisdiction over a direct action against the Trust. Nor can I identify any

prejudice which will inure to the plaintiff if the Trust remains a third-party defendant in this action. Absent either clear authority or undue prejudice, I decline to permit an amendment to the complaint which could jeopardize a judgment in this action which has already proceeded to judgment once.

Owens-Corning Fiberglas's Motion to Dismiss the Wrongful Death Claim

Defendant OCF seeks dismissal as untimely of plaintiff's wrongful death claim. OCF states that at the time of his death in 1981, Mr. Kulzer had a viable claim for personal injury based upon his last exposure (within three years) to asbestos-containing products and that Mrs. Kulzer, as his representative, *could* have brought a wrongful death action within two years of his death. Thus, OCF argues that this wrongful death action is subject to an exception to the Revival Statute upon which plaintiff relies.

The Revival Statute states in relevant part:

> Notwithstanding any other provision of law, . . . , every action for personal injury, injury to property or death caused by the latent effects of exposure to . . . asbestos, . . . upon or within the body or upon or within property which is barred as of the effective date of this action [July 30, 1986] or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act; provided, however, that this

> section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death and could have been brought pursuant to § 5-4.1 of the Estates, Powers and Trusts Law. . . . Ch. 682, L. 1986, *reprinted in* 1986 McKinney's Session Laws of New York at 1567.

Plaintiff opposes OCF's motion on multiple grounds. Plaintiff's initial point is that the motion is actually a motion for summary judgment, since OCF has already submitted an answer and cites to supporting materials outside of the pleadings. In substantive opposition to the motion, plaintiff states that Mr. Kulzer was not exposed to asbestos-containing products above "background levels" within the three years prior to his death; that OCF has failed to tender any proof that Mr. Kulzer was exposed to *OCF asbestos-containing products* within three years of his death; and that, while the general pleading of a statute of limitations defense is ordinarily sufficient to preserve it, OCF failed to plead adequately the "Revival Statute defense" which forms the basis of this motion, and thus waived the defense.

In *Greene v. Abbott Laboratories*, 148 A.D.2d 403 (1st Dep't. 1989), the only reported New York case concerning the wrongful death exclusion within the Revival Statute, an action was commenced in 1987 on behalf of an infant decedent who had died in 1969. The infant's claims were not barred at the time of her death because of the tolling provisions and thus, plaintiff's representative could have commenced a wrongful death action within two years of the death. The trial court granted defendants' motion for summary judgment, holding that "it would be improper to judicially extend the revival provision as it related to

wrongful death claims." *Greene*, 137 Misc.2d 424, 426-427. The First Department affirmed the granting of the motions.

In three unreported asbestos cases, Judge Sifton has expressly followed *Greene*, holding that wrongful death actions which "could have been brought" pursuant to both the applicable statute of limitations and the EPTL are not revived by the Revival Statute.

On September 17, 1990, the Second Circuit affirmed *Cassesse*, with decision to follow. Because this motion may turn on an issue of law which the Second Circuit may articulate in its decision or upon an issue of fact to be adduced at trial, determination of this motion is deferred.

The Manville Trust's Opposition to an Amended Complaint Stating a Direct Claim Against It

Plaintiff has already filed an amended complaint stating a direct claim against the Manville Trust, pursuant to the provisions of Case Management Order No. 6 and seeks to incorporate such a direct claim into the proposed amended complaint which is the subject of this motion.

As stated above, the jurisdictional basis for such direct claim is, at the very least, questionable; this jurisdictional defect could threaten the integrity of a judgment in this case and ultimately result in additional litigation and expense to all the parties. Accordingly, such amendment will not be permitted.

WHEREFORE, plaintiff's motion to amend the complaint is denied in part, granted in part, and deferred in part pending trial; for purposes of trial, the caption of

this action shall reflect a direct claim against Owens-Corning Fiberglas and a third-party action against the Manville Trust; and the motion of defendant OCF to dismiss plaintiff's wrongful death claim is deferred.

ALL OF THE ABOVE IS SO ORDERED.

/s/ Michael A. Telesca
MICHAEL A. TELESCA
United States
District Judge

DATED: Rochester, New York
October 16, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAULINE KULZER,

Plaintiff, CIV-87 0386T

- vs -

OWENS-CORNING FIBERGLAS CORP.,

Defendant.

MANVILLE CORPORATION ASBESTOS DISABILITY COMP. FUND.

Third-Party Defendant

Take notice of a judgment, of which the within is a copy, duly granted in the within entitled action on the 5th day of November, 1990 and entered in the office of the Clerk of the United States District Court, Western District of New York, on the 5th day of November, 1990.

Dated: Rochester, New York

November 5, 1990

Clerk
United States District Court
Western District of New York
282 U. S. Courthouse
Rochester, New York 14614

To: S. Schwarz, Esq.
M. Yoeli, Esq.
P. Marlette, Esq.

AO 450 (Rev. 5/05) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

PAULINE KULZER, as Executrix of the Estate of RICHARD KULZER, Deceased

v.

OWENS-CORNING FIBERGLAS CORP.,

Defendant

MANVILLE CORPORATION ASBESTOS DISABILITY COMP. FUND,

Third-Party Defendant

JUDGMENT IN A CIVIL CASE (Filed Nov. 5, 1990)

CASE NUMBER: CIV-87-00386T

x Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff is awarded $250,000.00 for conscious pain and suffering; $21,468.25 for medical and burial expenses; $450,000.00 for wrongful death, to which 9% interest is added from date of death August 31, 1981, for a total interest of $370,657.53, for a total wrongful death award of $820,657.53; $25,000.00 for plaintiff's derivitive cause of action; for a total award of $1,117,125.78. Jury finds defendant Owens-Corning Fiberglas corporation forty

(40%) percent at fault and third-party defendant Manville Corporation Asbestos Disability Comp. Fund twenty five (25%) percent at fault.

November 5, 1990
Date

MICHAEL J. KAPLAN
Clerk

/s/ Janet E. Mulley
JANET E. MULLEY
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAULINE KULZER, as Executrix of the Estate of RICHARD KULZER, Deceased,

Plaintiff,

v.

OWENS-CORNING FIBERGLAS CORPORATION,

Defendants.

CIV-87-0386T

DECISION and ORDER

Defendant OCF has moved to dismiss plaintiff's wrongful death claim, arguing that New York's Toxic Tort Revival Statute (L. 1986, Ch. 682, § 4) does not revive this claim. For the reasons stated briefly below, defendant's motion is denied.

OCF states that at the time of his death in 1981, Mr. Kulzer had a viable claim for personal injury based upon his last exposure (within three years) to asbestos-containing products and Mrs. Kulzer, as his representative, *could* have brought a wrongful death action within two years of his death. Thus, OCF argues that this wrongful death action is subject to an exception to the Revival Statute which excludes any action for wrongful death, not barred at the time of death, which could have been brought pursuant to EPTL § 5-4.1.

The Revival Statute states in relevant part:

> Notwithstanding any other provision of law, . . . , every action for personal injury, injury

> to property or death caused by the latent effects of exposure to . . . asbestos, . . . upon or within the body or upon or within property which is barred as of [July 30, 1986] or which was dismissed prior to the effective date of this act solely because the applicable period of limitations has or had expired is hereby revived and an action thereon may be commenced provided such action is commenced within one year from the effective date of this act; provided, however, that this section shall not revive any action for damages for a wrongful act, neglect or default causing a decedent's death which was not barred as of the date of death and could have been brought pursuant to § 5-4.1 of the Estates, Powers and Trusts Law. . . . Ch. 682, L. 1986, *reprinted in* 1986 McKinney's Session Laws of New York at 1567.

Plaintiff opposes OCF's motion on multiple grounds, stating that Mr. Kulzer was not exposed to asbestos-containing products above "background levels" within the three years prior to his death; that OCF has failed to tender any proof that Mr. Kulzer was exposed to *OCF asbestos-containing products* within three years of his death; and that while the general pleading of a statute of limitations defense is ordinarily sufficient to preserve it, OCF failed to plead adequately the "Revival Statute defense" which forms the basis of this motion and thus waived the defense.

In *Greene v. Abbott Laboratories*, 137 Misc.2d 424 (N.Y. Sup. Ct. 1987), *aff'd*, 148 A.D.2d 403 (1st Dep't. 1989), the only reported New York case concerning the wrongful death exclusion within the revival statute, an action was commenced in 1987 on behalf of an infant decedent who

had died in 1969. The infant's claims were not barred at the time of her death because of the tolling provisions and thus, plaintiff's representative could have commenced a wrongful death action within two years of the death. The trial court granted defendants' motion for summary judgment, holding that "it would be improper to judicially extend the revival provision as it related to wrongful death claims." *Greene*, 137 Misc.2d at 426-427.

In three unreported asbestos cases,[1] District Judge Sifton has expressly followed *Greene*, holding that wrongful death actions which "could have been brought" pursuant to both the applicable statute of limitations (three years from last exposure) and the EPTL are not revived by the Revival Statute.

Judge Sifton relied upon the express language of the revival statute and upon the three-year statute of limitations then applicable to claims arising from exposure to hazardous substances, which ran from the last date of exposure.[2] *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008 (1981), *cert. denied*, 456 U.S. 967 (1982). In the cases decided by Judge Sifton, plaintiffs had argued that the

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[1] *Cassese*, CV-88-1918 (S.D.N.Y. December 29, 1989), *Anderson*, CV-87-4567, and *Oefelein*, CV-87-4279 (S.D.N.Y. December 15, 1988).

[2] This remained the law in New York until the passage of the Toxic Tort Reform Act of 1986 which provides that the limitations period runs from the date plaintiff discovers or should have discovered the injury. N.Y. Civ. Prac. L. and R. § 214-c (McKinney 1990). This discovery rule does not apply to this case.

statute of limitations ran from the date of the last significant exposure to asbestos, that is, from the last exposure causally related to the injuries alleged. Judge Sifton rejected this argument, stating that exposure for statute of limitations purposes is "quite different" from exposure for purposes of causation and "[i]n all events plaintiffs have consistently taken the position in these cases that the injurious effects of exposure to asbestos are cumulative." *Anderson* and *Oefelein*, slip op. at 6. Thus, in all three cases, Judge Sifton granted summary judgment to the defendants and dismissed plaintiffs' wrongful death claims.

I find that position neither applicable to the facts of this case nor supported by New York law.[3]

The Procedural History of This Issue

Defendant OCF originally moved to dismiss plaintiff's wrongful death claim in April 1990, on the eve of the first trial of this action; I denied that motion for lateness. OCF renewed its motion September 24, 1990; the second trial commenced October 22, 1990.

Plaintiff has consistently stated that throughout the lengthy pre-trial period, it had no timely notice of defendant's intention to move to dismiss the wrongful death claim on the basis of the Revival Statute and that, accordingly, OCF has waived this ground for dismissal.

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[3] I acknowledge that judgment in *Cassese* has been affirmed by the Second Circuit, *see Cassese v. National Gypsum Co.*, 913 F.2d 58 (1990); in that affirmance, the Court indicated that "an opinion will follow in due course."

OCF insists that it has preserved this defense to the wrongful death claim by inserting in its Western District Asbestos Litigation Standard Answer an affirmative defense regarding statute of limitations, which answer was filed in August 1989.[4] OCF failed to file and serve an answer in this action until April 1990, upon the eve of the first trial. That answer contains the same affirmative defense of statute of limitations. That answer also contains an affirmative defense specifically challenging the constitutionality of the Revival Statute.[5] OCF maintains that such pleading preserves the defense which it now raises.

It is undisputed that notice pleading is the accepted federal mode. Fed. R. Civ. P. 8; *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 103 (1957). Federal procedure requires the defendant to "state in short and plain terms the [ ] defenses to each claim asserted and [to] admit or deny the averments upon which the adverse party relies." Fed. R. Civ. P. 8(b). The rationale for such simplified notice pleading is "the liberal opportunities for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and

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[4] OCF's affirmative defense states: "To the extent that the complaint herein and the claims made by plaintiff were not commenced within the time limited by law, the complaint is barred by the applicable statute of limitations."

[5] This affirmative defense is stated at page 11 of OCF's answer as its 34th affirmative defense and states: "To the extent that plaintiff relies on the New York Law 1986 C. 682, § 4 as grounds for reviving or maintaining the action, said statute(s) is unconstitutional and deprives Owens-Corning of its constitutional rights and is wholly void and unenforceable."

defense and to define more narrowly the disputed facts and issues." *Conley v. Gibson*, 78 S. Ct. at 103.

"Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice,' " *id.*, I find that OCF's answers neither adequately set forth the affirmative defense it now raises nor provide plaintiff of notice of its basis. *Id.*; *see also Sandoval v. State*, 559 N.Y.S.2d 115 (N.Y. Ct. Cl. 1990) (When pleading a generic statute of limitations defense gives no notice of the specific defect upon which defendant relies, defect is waived.)

I find that defendant OCF, having failed to raise at any time prior to pre-trial submissions the specific defense that plaintiff's wrongful death claim is subject to an express exception to the Revival Statute, has waived that defense. To hold otherwise would render pleading "a game of skill in which one misstep by counsel may be decisive to the outcome," *Conley v. Gibson*, 78 S. Ct. at 103.

Accrual of the Cause of Action

Even were I not to find that OCF's waiver of this affirmative defense precludes its determination on the merits, I would not find that dismissal of plaintiff's wrongful death action is compelled by existing law. Under the former statute of limitations which is applicable to this case, "the cause of action accrue[d] only when . . . there is a *wrongful* invasion of personal or property rights. . . . " *Schmidt v. Merchants Despatch Trans. Co.*, 270 N.Y. 287, 300 (1936) (emphasis added); *see Schwartz v. Heyden Chemical Corp.*, 12 N.Y.2d 212, 216 (1963); *see also Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 1011

(1981) (Fuchsberg, J., dissenting). These cases persuade me that, under New York law, a cause of action accrues upon the last significant exposure to a hazardous substance, that is, the last exposure which could have caused the injuries of which plaintiff complains.

In this case, plaintiff alleges that Richard Kulzer's exposure to asbestos occurred during his employment at Eastman Kodak. She further alleges that his employment, and his exposure to asbestos, changed radically when Mr. Kulzer was promoted to the position of foreman in January 1977.[6] Plaintiff alleges that, before that date, Mr. Kulzer was regularly exposed to asbestos-containing products; she has testified that when he returned home from work, his clothes were often covered with the dust from such products. From the time Mr. Kulzer was promoted to foreman, however, his exposure to asbestos-containing products was significantly curtailed, not only because his duties were different, but also because Kodak had ceased to use asbestos products and was requiring safety precautions (e.g., respirators, disposal work clothes, etc.) for its employees working in areas from which asbestos was being removed.

Thus, plaintiff claims that Mr. Kulzer's exposure to asbestos-containing products within three years of the date of his death was significantly different from his

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[6] The parties have stipulated that Mr. Kulzer was promoted in January of 1977. I recall proof introduced at the first trial of this action that Mr. Kulzer became a foreman as early as 1974. Since this discrepancy does not affect the analysis of this decision – indeed, the proof of an earlier promotion only strengthens the analysis – there is no need to resolve it.

earlier exposure to those same products. At the very least, these two periods of exposure must be treated separately in determining the proximate cause of Mr. Kulzer's illness and death. "[I]n the context of a proximate cause determination, [the New York Court of Appeals] has stated that '[g]iven the unique nature of the inquiry in each case, it is for the finder of fact to determine legal cause once the court has been satisfied that a prima facie case has been made.' " *Ziecker v. Orchard Park*, 75 N.Y.2d 761, 762-63 (1981), quoting *Deridiarian v. Felix Construction Corp.*, 51 N.Y.2d 308, 315 (1980).

This case has already proceeded to judgment once and been the subject of a successful motion for a new trial. While I am confident that I do not abuse my discretion in deciding this issue solely on the basis of defendant's failure to give timely and meaningful notice of its Revival Statute defense, I find that the interests of justice will be served by submitting to the jury special interrogatories in order to permit the finder of fact to determine whether these distinct periods of exposure to asbestos-containing products, or either of them, constitutes proximate cause. Thus, the record will provide a complete basis for a verdict and judgment.

WHEREFORE, defendant OCF's motion to dismiss the wrongful death claim is denied in accordance with this decision and order.

ALL OF THE ABOVE IS SO ORDERED.

/s/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
November ___, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAULINE KULZER, as the Executrix of the Estate of RICHARD KULZER, Deceased,

Plaintiff,

v.

PITTSBURGH-CORNING CORP., EAGLE-PICHER INDUSTRIES, INC., OWENS-CORNING FIBERGLAS CORP., OWENS-ILLINOIS, INC., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., ANCHEK PRODUCTS, INC., GAF CORP., ARMSTRONG WORLD INDUSTRIES, UNITED STATES GYPSUM CO., H.K. PORTER COMPANY, INC., NICOLET, INC., CAREY CANADA, INC.,

Defendants.

Civ-87-386T

ORDER

The mandate in this case comes to me for execution after appeal by defendant Owens-Corning Fiberglas Corporation ("OCF") from this Court's (i) denial of OCF's motion to dismiss the plaintiff's wrongful death claim, (ii) granting of a new trial following a jury verdict in OCF's favor, and (iii) entry of judgment in favor of the plaintiff following a second trial and jury verdict. In deciding the appeal, a panel of the Second Circuit held

that this Court erred in denying OCF's motion to dismiss the plaintiff's wrongful death claim, (ii) granting of a new trial following a jury verdict in OCF's favor, and (iii) entry of judgment in favor of the plaintiff following a second trial and jury verdict. In deciding the appeal, a panel of the Second Circuit held that this Court erred in denying OCF's motion to dismiss the plaintiff's wrongful death claim.[1] *Kulzer v. Pittsburgh Corning Corp.*, 942 F.2d 122 (1991). Having so decided, the panel declined to "reach the merits of OCF's other arguments. . . . " *Id.* at 128. On the basis of that holding, and with no further comment, the panel dismissed the entire complaint, notwithstanding the fact that OCF's motion had been addressed *solely* to plaintiff's wrongful death *claim* and the fact that the caselaw relied upon by the panel, *see In Re Joint Eastern and Southern District Asbestos Litigation: Cassese*, 1989 WL 162781 (E.D.N.Y. 1989), *affirmed*, 921 F.2d 405 (2d Cir. 1990), had concerned only a motion for *partial* summary judgment and had resulted in the dismissal

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[1] Perhaps the Second Circuit's Mandate requires dismissal of the entire complaint – rather than of the wrongful death claim alone – because the Second Circuit identified the "dispositive question on appeal [as] whether the wrongful death *action* falls within an exception to [the revival statute.]" *Kulzer*, 942 F.2d at 123 (emphasis added). It is, however, basic hornbook law that, "the death action, with its own statute of limitations, and with the recovery going to those next of kin who depended upon the decedent for support, is totally distinct from the underlying personal injury cause of action, with its own statute of limitations, and whose recovery passes through the estate of the decedent." J.M. McLauglin, *Practice Commentaries*, "Retroactivity," *published in* 7B N.Y.Civ.Prac.L.&R. § 214-c, 636 – 639 at 637 (McKinney 1990).

only of the wrongful death claim and not the entire complaint.

In her petition for rehearing and suggestion for rehearing *en banc*, the plaintiff specifically asked the panel to reconsider this wholesale dismissal. But that petition has been denied and the mandate has issued. After much thought, justice compels as to do more than merely enact the mandate without comment.

Judge Friendly aptly stated the duty of a district court to execute the mandate of a court of appeals:

> . . . it is fundamental that a district court must carry out the mandate of a court of appeals, even if the mandate was in error, citations omitted. *Crane Co. v. American Standard, Inc.*, 490 F.2d 332, 341 (2d Cir. 1973).

This duty is a function of the "mandate rule," an aspect of the "law of the case" doctrine, which is "based on the salutary and sound public policy that litigation should come to an end." *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967). That doctrine,

> when used to express the duty of a lower court to follow what has been decided by a higher court at an earlier stage of the case, applies to everything decided, either expressly or by necessary implication. *Munro v. Post*, 102 F.2d 686, 688 (2d Cir. 1939).

Presented with a mandate duly issued by the Second Circuit, I am

> bound by the decree . . . , and must carry it into execution according to the mandate. [I] cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or

> review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 16 S.Ct. 291, 293 (1895).

Other courts have expressly recognized exceptions to the application of the law of the case rule. In *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984), the court explored a number of precedents of the Fifth and Eleventh Circuits which recognized

> three narrowly drawn exceptional circumstances in which the law of the case rule will not be applied . . . when (1) the evidence on a subsequent trial was substantially different, (2) controlling [legal] authority [has changed], or (3) the previous decision was clearly erroneous and would work a manifest injustice. *Id.* at 768, citations omitted.

This circuit, however, has stated that the remedy under such exceptional circumstances is for the aggrieved party "to seek a modification of the mandate." *Crane*, 490 F.2d at 341; *see also Riley v. MEBA Pension Trust*, 586 F.2d 968, 972 (2d Cir. 1978).

I am convinced that, in providing for the dismissal of the entire complaint rather than just the wrongful death claim, this mandate is clearly wrong and works a manifest injustice.[2] The depth of this conviction is exceeded

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[2] My conviction is not based upon the legal analysis of the panel's decision concerning the interpretation of the New York State revival statute at issue, other than the fact that such analysis neither expressly nor impliedly requires the dismissal

(Continued on following page)

only by my fundamental faith in our system of appellate jurisprudence and in the ability of this Circuit Court, within which I have had the honor to serve as a district judge for nearly ten years, to recognize that "justice is better than consistency," *Westbrook*, 743 F.2d at 764, citation omitted, and to do what is right. Confirmed in that faith, I issue this Order, but not without first respectfully making these comments.

WHEREFORE, pursuant to the Mandate of the Second Circuit issued October 18, 1991, the Judgment entered in this Court November 6, 1991, in favor of the plaintiff, is vacated, and the complaint is dismissed.

ALL OF THE ABOVE IS SO ORDERED.

/s/ Michael A. Telesca
MICHAEL A. TELESCA
United States
District Judge

DATED: Rochester, New York
November ___, 1991

(Continued from previous page)

of the entire complaint, as proven by the partial dismissal effected in *Cassese Monte* on similar facts and by the failure of defendant OCF on appeal *either to brief or even to ask for* dismissal of the entire complaint based on the revival statute.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of October one thousand nine hundred and ninety-one.

PAULINE KULZER, as Executrix of the Estate of RICHARD KULZER, Deceased,

Plaintiff-Appellee,

V.

PITTSBURGH-CORNING CORP.; EAGLE-PICHER INDUSTRIES.; OWENS-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS, INC.; CELOTEX CORPORATION; RAYMARK INDUSTRIES, INC.; AMCHEM PRODUCTS, INC; GAF CORP; ARMSTRONG WORLD INDUSTRIES; UNITED STATES GYPSUM CO.; H.K. PORTER COMPANY, INC.; NICOLET, INC.; CAREY CANADA, INC.

Defendant

V.

OWENS-CORNING FIBERGLAS CORP.;

Defendant-Appellant-
Cross-Appellee

Docket Nos:
90-9062
90-9132

(Filed
Oct. 7, 1991)

MANVILLE CORPORATION
ASBESTOS DISABILITY
COMP. FUND

Third-Party-Defendant-
Appellee-Cross-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee PAULINE KULZER,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH,
Clerk

PAGE 1

Second Circuit Rule 37(a) governing use of this form is registered on reverse of Page 2 move requirement that supporting affidavits be attached.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KULZER v. PITTSBURG CORNING *Use short title*	90-9062 Illegible **NOTICE OF MOTION** *state type of motion* *for Amend the Mandate* *(Filed Nov. 14, 1991)*

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Stephen G. Schwarz, Esq.
Faraci, Guadagnino, Lange & Johns
300 Times Square Building
Rochester, NY 14614
716-325-5150

Has consent of opposing counsel:

A. been sought? _ Yes x No

B. been obtained? _ Yes x No

Has service been effected? x Yes _ No

Is oral argument desired? _ Yes x No

(Substantive motions only) Second Circuit Rule 27(c) states that oral argument is ordinarily not available on a motion to modify the mandate.

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? _ Yes _ No

B. by firm date of argument notice? _ Yes _ No

C. If yes, enter date: _____

Judge or agency whose order is being appealed:

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Franklin B. Velie, Esq.	John Laden, Esq.
Christy & Veiner	Gordon & Silber, PC
620 Fifth Avenue	99 Park Avenue
New York, NY 10020	New York, NY 10016
212-632-5500	212-687-2090

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? _ Yes _ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? _ Yes _ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? _ Yes _ No

Brief statement of the relief requested:

Motion by plaintiff to amend the mandate issued by this Court in this matter to dismiss only the wrongful death claim.

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/ Illegible
Signed name must be printed beneath

Stephen G. Schwarz, Esq.

Appearing for: *(Name of party)*

Pauline Kulzer

Appellant or Petitioner:
___ Plaintiff ___ Defendant

Appellee or Respondent:
___ Plaintiff ___ Defendant

Date

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it here is denied.

(Filed Dec. 16, 1991)

/s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

/s/ George C. Pratt
George C. Pratt, U.S.C.J.

Illegible Signature

* * *

[p. 924] Kulzer vs. OCF, et al

THE COURT: Ladies and gentleman, at this time in the trial it is customary for some legal issues to be decided by the Court out of the presence of the jury.

I will excuse you and I will let you know when we need you again. Please retire to the jury room. (Jury not present.)

THE COURT: Are there any motions?

MR. VELIE: Yes, there are, your Honor. May I just have a moment.

With the court's permission I have briefed our motions and I would like to hand it up and also give my brief to Mr. Schwarz.

Your Honor, our motion at this time is to dismiss the wrongful death claim. The uncontradicted testimony of three product ID witnesses – Helm, Hart and Shaw – is that Mr. Kulzer was exposed to asbestos dust in 1978, 1979 and 1980. I have laid out at length in our brief the exact quotations that we rely on.

Under these circumstances since he was exposed to asbestos – and the key word here is exposed. I'll come back to that in a moment – within three years of his death at or about immediately before his death he possessed a non-time-barred personal injury action by reason of asbestos exposure.

Accordingly, at and after his death and for

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAULINE KULZER, as Executrix of the Estate of RICHARD KULZER, Deceased,

Plaintiff,

vs.

OWENS-CORNING FIBERGLAS CORPORATION and MANVILLE CORP. ASBESTOS DISEASE COMPENSATION FUND,

Defendants.

Western District
Asbestos Litigation

AFFIDAVIT

CIV-87-0386T
Hon. Michael A. Telesca

STATE OF NEW YORK)
COUNTY OF ERIE SS.
CITY OF BUFFALO)

PETER S. MARLETTE, ESQ., being duly sworn, deposes and says:

1. I am attorney duly admitted to practice law in this Court and I am associated with the law firm of Damon & Morey, attorneys for defendant, Owens-Corning Fiberglas Corporation in the above-captioned matter. As such, I am fully familiar with the pleadings and proceeding herein.

2. I submit this affidavit in support of Owens-Corning Fiberglas Corporation's motion to dismiss plaintiff's cause of action for wrongful death on the grounds of it

being time-barred and not revived by New York's Revival Statute.

3. As set forth more fully in the accompanying memorandum of law, plaintiff's cause of action for her husband's personal injuries was viable on the date of Mr. Kulzer's death as he was last exposed to asbestos and asbestos products within three years of the date of his death. (See testimony given by Mr. Kulzer's co-workers at the original trial of this action in April, 1990).

4. As the underlying claim for personal injuries arising out of Mr. Kulzer's exposure to asbestos was viable on the date of his death, plaintiff, as his spouse and executrix of his estate, could have brought an action for wrongful death within two years of the date of death pursuant to EPTL §5-4.1.

5. Pursuant to EPTL §5-4.1, plaintiff's cause of action for a wrongful death expired on August 31, 1983, two years after Mr. Kulzer's death on August 31, 1981.

6. Plaintiff did not commence this action for personal injuries and wrongful death until 1986.

7. As set forth more fully in the accompanying memorandum of law, plaintiff's cause of action for wrongful death herein was not revived by Section 4 of the 1986 New York Tort Reform Act, (Ch. 682, L. 1986), the "Revival Statute", but does in fact fall into the Statute's exception because plaintiff's underlying claim for her husband's personal injuries was *not* time-barred on the date of his death.

8. Owens-Corning Fiberglas Corporation sufficiently and properly plead its affirmative defense of statute of limitations in both its WDAL Standard Answers with Affirmative Defenses and in its specific answer with affirmative defenses to the *Kulzer* complaint.

9. As set forth more fully in the accompanying memorandum of law, "notice" pleading is sufficient to raise an affirmative defense pursuant to FRCP Rule 8.

10. Plaintiff's counsel has been on notice of Owens-Corning Fiberglas Corporation's statute of limitations affirmative defense since August, 1989, well before the commencement of the original trial of this action, when Owens-Corning filed its initial WDAL Standard Answer with Affirmative Defenses.

WHEREFORE, Owens-Corning Fiberglas Corporation respectfully requests that this Court grant its motion and dismiss plaintiff's wrongful death cause of action as against Owens-Corning.

DATED: Buffalo, New York
September 24, 1990

DAMON & MOREY

By: /s/ Peter S. Marlette
Peter S. Marlette, Esq.

Attorneys for Defendant
Owens-Corning Fiberglas Corporation
298 Main Street
1000 Cathedral Place
Buffalo, New York 14202
Telephone: (716) 856-5500

Sworn to before me this
24th day of September, 1990.

/s/ Mary Jo Herrscher
Notary Public
MARY JO HERRSCHER
Notary Public State of New York
Qualified in Erie County
My Commission Expires May 8, 1991

TO: Stephen G. Schwarz, Esq.
FARACI, GUADAGNINO, LANGE & JOHNS
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAULINE KULZER, as Exexcutrix of the Estate of RICHARD KULZER, Deceased,

Plaintiff,

v.

OWENS-CORNING FIBERGLAS CORPORATION,

Defendant.

Civ.-87-00386T

NOTICE OF APPEAL

Notice is hereby given that Owens-Corning Fiberglas Corporation ("Owens-Corning"), defendant named above, hereby appeals to the United States Court of Appeals for the Second Circuit, *inter alia*, from: (1) the final judgment entered in this action on November 5, 1990 (a copy of which is attached as Exhibit A); (2) the Decision and Order of the district court entered on November 1, 1990, denying Owens-Corning's motion to dismiss plaintiff's wrongful death claim on the grounds of statute of limitations; (3) the Decision and Order of the district court entered on July 5, 1990, granting plaintiff a second trial, thereby depriving Owens-Corning of a jury verdict in its favor rendered on May 8, 1990, after the first trial of this action; (4) the district court's rulings during the second trial:

(a) excluding the testimony of witnesses proffered by Owens-Corning in support of its

state-of-the-art defense, to wit, Dr. Kenny S. Crump, H. Corwin Hinshaw, and Harry Demopoulos;

(b) permitting plaintiff to argue that Owens-Corning failed to produce witnesses to support its state-of-the-art defense, notwithstanding that the district court improperly excluded Owens-Corning's witnesses;

(c) improperly charging the jury that Owens-Corning bore the burden of proof with respect to the state-of-the-art defense;

(d) improperly denying Owens-Corning's motion for a mistrial, where plaintiff made an argument in its opening based on a document which was later excluded by the district court as inadmissable and the district court gave an inadequate curative instruction;

(e) failing to charge the jury, and denying Owens-Corning's application to argue, that plaintiff's decedent's employer's negligence was an "intervening cause" of plaintiff's decedent's illness and death; and

(f) awarding prejudgment interest to plaintiff on the jury's award for plaintiff's wrongful death claim where the verdict form submitted to the jury failed to address prejudgment interest and failed to set forth the manner in which the jury arrived at the award for lost wages, the jury was given no instructions as to the proper procedure for arriving at an award for lost wages, and the interest award fixed by the district court was improperly calculated;

(5) the Decision and Order of the district court entered on November 21, 1990, denying Owens-Corning's post-trial motions for judgment n.o.v., for a new trial, and to amend the judgment with respect to the calculation of interest; and

(6) the Decision and Order of the district court, during the first trial, dated May 1, 1990, denying Owens-Corning's motion for a directed verdict on plaintiff's wrongful death claim on grounds of statute of limitations; and

(7) the Decision and Order of the district court, during the first trial, dated April 25, 1990, denying Owens-Corning's motion for reconsideration of, and reaffirming, the district's ruling excluding the testimony of Dr. Kenny S. Crump.

Dated: New York, New York
November 30, 1990

CHRISTY & VIENER

By: /s/ Franklin B. Velie
Franklin B. Velie
FV 4918

620 Fifth Avenue
New York, New York 10020
(212) 632-5500

Attorneys for Defendant-
Appellant
Owens-Corning Fiberglas

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The Manville Corp. Asbestos Disease
Compensation Fund

Supreme Court, U.S.
FILED
MAR 3 1992
OFFICE OF THE CLERK

No. 91-1279

In The

Supreme Court of the United States

October Term, 1991

PAULINE KULZER, Individually and as Executrix of the Estate of Richard Kulzer, Deceased,

Petitioner,

-against-

OWENS-CORNING FIBERGLAS CORP.,

Respondent,

MANVILLE CORPORATION ASBESTOS DISABILITY COMP. FUND,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT OWENS-CORNING FIBERGLAS CORPORATION

FRANKLIN B. VELIE, ESQ.,
Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to consider the Petition for Certiorari where Petitioner filed the Petition for Certiorari more than ninety days after the denial of the petition for rehearing by the Court of Appeals?

2. Is the time for filing a petition for certiorari tolled by a motion filed after the denial of a petition for rehearing, seeking the same relief, and made without seeking an extension of time in which to file a petition for certiorari?

3. Where Petitioner claims that the Court of Appeals failed to address issues necessary to its decision dismissing her complaint, but where those issues were before the Court on the appeal and twice more brought to the Court's attention on post-appellate motions, and the Court denied those motions, does Petitioner state any grounds for relief in this Court?

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Title 28, United States Code, Section 2101(c) 1, 4, 6

RULES:

Rules of the Supreme Court of the United States

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JURISDICTIONAL STATEMENT

This Court is without jurisdiction to consider the Petition for Certiorari. Petitioner's petition for rehearing was denied by the United States Court of Appeals for the Second Circuit on October 7, 1991. Petitioner filed her Petition for Certiorari by mail postmarked January 7, 1992, more than ninety days after the denial of her petition for rehearing. Petitioner neither obtained nor even sought an extension of time within which to file a petition for a writ of certiorari. Pursuant to Title 28, United States Code, Section 2101(c) and Rule 13 of the Rules of the Supreme Court of the United States, Petitioner's Petition for Certiorari is jurisdictionally out of time.

STATEMENT OF THE CASE

This asbestos personal injury action was first tried before a jury in the United States District Court for the Western District of New York in April, 1990 ("Kulzer I"). After two weeks of trial, the jury returned a verdict in favor of defendant-respondent Owens-Corning Fiberglas Corporation ("OCF") and two co-defendants.[1] The trial court thereafter set aside the verdict and ordered a new trial. In November, 1990, after a second two-week trial ("Kulzer II"), the jury returned a verdict for plaintiff-petitioner Pauline Kulzer ("Petitioner" or "Kulzer").

[1] In accordance with Rule 29 of the Rules of the Supreme Court of the United States, OCF states that OCF has no corporate parent and that, excluding wholly-owned subsidiaries, OCF has one non-wholly-owned subsidiary, Veroc Technology A/S.

OCF appealed to the United States Court of Appeals for the Second Circuit ("Second Circuit") on numerous grounds including: (1) the district court twice improperly denied OCF's motions to dismiss Kulzer's wrongful death claim as barred by the Statute of Limitations; (2) the district court improperly granted Kulzer's motion for a second trial, substituting its judgment for that of the jury; and (3) OCF was denied a fair second trial as the result of numerous errors committed by the district court.[2]

The Second Circuit reversed the judgment against OCF and remanded to the district court with instructions to dismiss the complaint.

Kulzer thereafter petitioned the Second Circuit for rehearing with a suggestion that the action be reheard in banc arguing, *inter alia*, that the Second Circuit erred in dismissing the entire complaint instead of just the wrongful death claim. On October 7, 1991, the Second Circuit denied the petition for rehearing. On November 1, 1991, pursuant to the Second Circuit's mandate which issued on October 18, 1991, the district court vacated the judgment against OCF and dismissed Kulzer's complaint.

On November 12, 1991, when there was no longer any action pending between the parties and nearly one month after Petitioner's motion for rehearing had been

---

[2] Those errors included improperly shifting the burden of proof to defendant OCF on a critical issue, instructing the jury to disregard the intervening negligence of Kulzer's decedent's employer, and permitting inflammatory argument by Kulzer's counsel.

denied, Petitioner filed a motion styled a "motion to amend the mandate," again arguing that only the wrongful death claim should have been dismissed. On December 16, 1991, the Second Circuit denied Kulzer's motion.

On January 7, 1992, more than ninety days after the denial of her petition for rehearing, Kulzer filed her Petition for Certiorari ("Petition" or "Petition for Certiorari"). By letter dated January 16, 1992, the Clerk of this Court notified Kulzer that her Petition for Certiorari, filed more than ninety days after the denial of her petition for rehearing, was jurisdictionally out of time and, therefore, would not be docketed.[3]

On January 27, 1992, Kulzer filed a Motion Directing the Clerk to Accept Petitioner's Petition for a Writ of Certiorari ("Motion"). Kulzer did not contest that the Petition was filed more than ninety days after denial of her petition for rehearing, but argued instead that the time should be computed from the denial of her subsequent motion to amend the mandate. On February 4, 1992, OCF filed an affidavit in opposition to the Motion.

On February 19, 1992, OCF learned that the Clerk's Office placed the Petition on this Court's docket on

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[3] The letter from the Office of the Clerk of this Court stated in pertinent part:

> The time for filing this petition appears to have expired on January 6, 1992, 90 days from October 7, 1991, the date rehearing was denied. The postmark, on the Express Mail package, indicates that the petition was mailed January 7, 1992, one day late, and therefore was untimely filed.

February 3, 1992, leaving the issue whether this Court has jurisdiction to consider the Petition to be resolved by this Court.

SUMMARY OF THE ARGUMENT

This Court is without jurisdiction to consider Petitioner's Petition for Certiorari. The Petition, filed more than ninety days after the denial of Petitioner's petition for rehearing by the Second Circuit, is jurisdictionally out of time, pursuant to Title 28, United States Code, Section 2101(c) and Rule 13 of the Rules of the Supreme Court of the United States. Petitioner neither obtained nor even sought an extension of time within which to file her Petition. Petitioner's motion before the Second Circuit to amend the mandate -- filed after the denial of her petition for rehearing and seeking the same relief which had been denied -- did not extend her time to file her Petition.

Even if the Petition had been timely filed, the Petition fails to raise any issue warranting review on writ of certiorari. Petitioner asks this Court to correct an alleged error in the Second Circuit's mandate which directed the district court to dismiss Kulzer's complaint. Petitioner contends that the mandate is in error because the appellate court's opinion addressed only one of three claims in the complaint. Petitioner, however, twice brought this alleged error to the attention of the appellate court by post-appellate motion and the Second Circuit twice denied the motion. Thus, contrary to Petitioner's contention that the Court of Appeals failed to consider issues

critical to its dismissal of her complaint, the Second Circuit twice affirmed its direction that the entire complaint be dismissed. That decision was amply supported by an extensive record spanning almost five years and replete with errors warranting the result reached.

Here, Petitioner's contention is not simply meritless. It also fails to raise any issue of constitutional dimension which would warrant the time and attention of this Court. It sets forth no "special and important reasons" for the grant of certiorari, as described in Rule 10 of the Rules of the Supreme Court of the United States.

Accordingly, Kulzer's Petition should be rejected as untimely filed or, alternatively, her Petition for Certiorari should be denied.

ARGUMENT

A. KULZER'S PETITION FOR CERTIORARI WAS UNTIMELY FILED

Kulzer's Petition for Certiorari was not filed within ninety days of the denial of her petition for rehearing. The failure to do so is jurisdictional.

Rule 13 of the Rules of the Supreme Court of the United States expressly provides:

> .1 A petition for a writ of certiorari . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment.
>
> * * *

> .4 The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. . . . However, if a petition for rehearing is timely filed in the lower court . . . the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

As this Court has held, the time limitations of Rule 13 reflecting Congress's mandate as set forth in Title 28, United States Code, Section 2101(c), are jurisdictional:

> Title 28 U.S.C. § 2101(c) (1982 ed.) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits.

Missouri v. Jenkins, 495 U.S. 33, ___, 110 S.Ct. 1651, 1660, 109 L.Ed. 2d 31 (1990).

Rule 13 further provides instructions to the Clerk of the Court with respect to untimely petitions:

> .3 The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

Petitioner contended in her Motion to this Court that her time to file a petition for certiorari was somehow tolled because she made a motion before the Second Circuit subsequent to the denial of her petition for rehearing seeking the same relief which had been denied. Petitioner, however, failed to offer any authority for this

proposition.[4] Nor is there any reason to permit a petitioner to thus extend the mandated time limit by the filing of a subsequent and duplicative motion. Indeed, Petitioner's argument is particularly unappealing when one considers that the rules of this Court provide a procedure for seeking an enlargement of time within which to file a petition for certiorari and Petitioner declined to avail herself of that procedure. *See* Rules 13 and 30 of the Rules of the Supreme Court of the United States. Thus, the circumstances here simply provide no justification for denying OCF the finality provided by the time limitations of Rule 13. After almost five years, two jury trials, an appeal, Petitioner's subsequent petition for rehearing with a suggestion for rehearing in banc, and her motion to amend the mandate, this litigation should finally conclude.

B. KULZER'S PETITION FOR CERTIORARI IS MERITLESS AND SETS FORTH NO REASONS WARRANTING REVIEW ON WRIT OF CERTIORARI

Kulzer's Petition for Certiorari is based on an alleged error in the mandate of the Second Circuit and does not concern, as Kulzer conceded in her Motion, "the propriety of the Second Circuit's legal opinion." Motion at 4. Kulzer argues, in essence, that the Second Circuit erred in

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[4] Indeed, the only cases cited by Petitioner in her Motion, *Crane Co. v. American Standard, Inc.*, 490 F.2d 332, 341 (2d Cir. 1973) and *Riley v. MEBA Pension Trust*, 586 F.2d 968, 972 (2d Cir. 1978), have nothing whatever to do with the issue whether a motion to amend a mandate tolls the time for filing a petition for certiorari.

discussing only one claim and dismissing three claims. When this alleged error was twice brought to the Second Circuit's attention, however, through Petitioner's motion for rehearing with a suggestion for rehearing in banc and through a motion to amend the mandate, the Second Circuit denied those motions, thereby ratifying its decision.[5]

Kulzer's contention that the Second Circuit ordered the complaint dismissed "without any legal justification for such an action," Petition at 12, is false. In fact, the Second Circuit was presented with an extensive record spanning almost five years and replete with errors warranting the dismissal of Kulzer's action. OCF raised, briefed and argued before the Second Circuit issues challenging the entirety of Kulzer's judgment.[6] Thus, the

---

[5] In denying Kulzer's petition for rehearing, the Second Circuit noted that the suggestion for rehearing in banc had been "transmitted to the judges of the court in regular active service and to any other judge that heard the appeal" and "no such judge has requested that a vote be taken." Appendix to the Petition ("App.") at 62.

[6] Petitioner's carefully crafted statements suggesting the contrary are misleading. Petitioner asserts in no less than two places in her Petition that "OCF did not raise any issue relating to the *timeliness* of petitioner's spousal derivative claim." Petition at 6 (emphasis added); *see also* Petition at 9-10. Petitioner also asserts that "the Second Circuit's mandate is unconstitutionally overbroad because it grants relief not requested by the respondent in the district court," and "not briefed by any of the parties on appeal." Petition at 7. Petitioner neglected to mention, however, that OCF challenged on appeal, among other things, the district court's grant of Kulzer's motion for a second trial (which deprived OCF of a jury verdict in its favor) and the district court's denial of OCF's motion for judgment n.o.v after the second trial. App. at 71-73.

Second Circuit's decision was amply supported by the record before it.

In short, Kulzer's Petition for Certiorari is based on some assumed entitlement to a written opinion by the Second Circuit justifying the dismissal of the entire complaint. The law, however, is to the contrary. *See Taylor v. McKeithen*, 407 U.S. 191, 92 S.Ct. 1980, 1982 n.4, 32 L.Ed. 648 (1972) ("the courts of appeals should have wide latitude in their decisions of whether or how to write opinions"); *Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983) ("[t]here is no requirement in law that a federal appellate court's decision be accompanied by a written opinion"); *see also Jones v. United States*, No. 88 Civ. 3999, 1990 WESTLAW 6566, at *2-3 (S.D.N.Y. Jan. 24, 1990) (in reinstating conviction on one ground, the appellate court implicitly rejected the defendant's separate challenge to that count on grounds of insufficiency of the evidence, although the court did not explicitly address the sufficiency argument), *aff'd*, 918 F.2d 9 (2d Cir. 1990).

Finally, Kulzer's contention that the Second Circuit's decision deprived her of her Seventh Amendment right to trial by jury is nothing more than a transparent pretext to mask a meritless claim, twice resolved by the appellate court and not warranting review by this Court. Indeed, on Kulzer's logic, any appellate error following a jury trial would raise Seventh Amendment issues. Clearly, Kulzer's Petition fails to raise any "special and important reasons" of the character of those set forth in Rule 10 of the Rules of the Supreme Court of the United States. Accordingly, Kulzer's Petition for Certiorari should be denied.

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CONCLUSION

For the foregoing reasons, this Court should find Kulzer's Petition for Certiorari to be jurisdictionally out of time. Alternatively, this Court should deny Kulzer's Petition for Certiorari as not warranting Supreme Court review.

Dated: March 4, 1992

Respectfully submitted,

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91-1279

Supreme Court, U.S.
FILED
FEB 5 1992
OFFICE OF THE CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAULINE KULZER, individually and as
Executrix of the Estate of Richard Kulzer, Deceased,

Petitioner,

-against-

OWENS-CORNING FIBERGLAS CORP.,

Respondent,

MANVILLE CORPORATION ASBESTOS DISABILITY COMP. FUND,

Respondent.

RESPONSE TO PETITIONER'S MOTION DIRECTING THE CLERK TO ACCEPT PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

RESPONSE FOR RESPONDENT OWENS-CORNING FIBERGLAS CORP.

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Preliminary Statement

Petitioner's Petition for Certiorari ("Petition") was filed more than ninety days after the denial of the Petitioner's petition for rehearing by the United States Court of Appeals for the Second Circuit (hereinafter "Second Circuit"). The Clerk of this Court properly declined to docket that Petition for Certiorari as "jurisdictionally out of time" pursuant to Rule 13 of the Rules of the Supreme Court of the United States.

Petitioner does not deny that her Petition was filed more than ninety days after the denial of her petition for rehearing. Petitioner argues instead that the Petition for Certiorari was timely because it was filed within ninety days of the denial of a subsequent motion before the Second Circuit, styled a Motion to Amend the Mandate. That motion sought the same relief which had been denied in the petition for rehearing. Moreover, it was not filed until one month after the denial of the petition for rehearing at a time when no action was pending between the parties because the complaint had been dismissed by the district court.

The Rules of this Court dc not permit a petitioner to extend artificially the time for filing a Petition for Certiorari by the filing of such a motion. Moreover, the Petition, which seeks "review of an erroneous mandate,"

(Petitioner's Motion at 4) fails to raise any issue warranting review on writ of certiorari.

Accordingly, Petitioner's Motion directing the Clerk to accept her Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

This asbestos personal injury action was first tried before a jury in the United States District Court for the Western District of New York in April, 1990 ("Kulzer I"). The jury returned a verdict in favor of defendant-respondent Owens-Corning Fiberglas Corporation ("OCF").[1] The trial court thereafter set aside the verdict and ordered a new trial. In November, 1990, after a second trial ("Kulzer II"), the jury returned a verdict for plaintiff-petitioner Pauline Kulzer ("Petitioner" or "Kulzer").

OCF appealed to the Second Circuit on numerous grounds including: (1) the district court twice improperly denied OCF's motions to dismiss Kulzer's wrongful death claim as barred by the Statute of Limitations; (2) the district court improperly granted Kulzer's motion for a second trial, substituting its judgment for that of the jury; and (3) OCF

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[1] In accordance with Rule 29 of the Rules of the Supreme Court of the United States, OCF states that OCF has no corporate parent and that, excluding wholly-owned subsidiaries, OCF has one non-wholly-owned subsidiary, Veroc Technology A/S.

was denied a fair second trial as the result of numerous errors committed by the district court.[2]

The Second Circuit reversed the judgment against OCF and remanded to the district court with instructions to dismiss the complaint.

Kulzer thereafter petitioned the Second Circuit for rehearing with a suggestion that the action be reheard in banc arguing, inter alia, that the Second Circuit erred in dismissing the entire complaint instead of just the wrongful death claim. On October 7, 1991, the Second Circuit denied the petition for rehearing. On November 1, 1991, the district court vacated the judgment against OCF and dismissed Kulzer's complaint.

On November 12, 1991, when there was no longer any action pending between the parties and nearly one month after Petitioner's motion for rehearing had been denied, Petitioner filed a motion styled a "motion to amend the mandate," again arguing that only the wrongful death claim should have been dismissed. On December 16, 1991, the Second Circuit denied Kulzer's motion. On January 6, 1992, more than ninety days after the denial of her petition for rehearing, Kulzer filed

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[2] Those errors included improperly shifting the burden of proof to defendant OCF on a critical issue, instructing the jury to disregard the intervening negligence of Kulzer's decedent's employer, and permitting inflammatory argument by Kulzer's counsel.

her Petition for Certiorari. The Clerk of this Court declined to docket the Petition and this Motion followed.

ARGUMENT

KULZER'S PETITION FOR CERTIORARI WAS UNTIMELY

Petitioner does not dispute that the Petition for Certiorari was not filed within ninety days of the denial of her petition for rehearing. The failure to do so, as the Clerk of this Court noted in rejecting the filing, was jurisdictional.

Rule 13 of the Rules of the Supreme Court of the United States expressly provides:

> .1 A petition for a writ of certiorari . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment.
>
> .4 The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. . . . However, if a petition for rehearing is timely filed in the lower court . . . the time for filing the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

As this Court has held, the time limitations of Rule 13 reflecting Congress' mandate as set forth in Title 28, United States Code, Section 2101(c), are jurisdictional:

> Title 28 U.S.C. § 2101(c) (1982 ed.) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits.

Missouri v. Jenkins, 495 U.S. 33, ___, 110 S.Ct. 1651, 1660, 109 L.Ed. 2d 31 (1990).

Rule 13 further provides instructions to the Clerk of the Court with respect to untimely petitions:

> .3 The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

Petitioner's contention is that, because she made a motion subsequent to the denial of her petition for rehearing seeking the same relief, her time to file the petition for certiorari was somehow tolled. Petitioner, however, fails to offer any authority for this proposition.[3] Nor is there any reason to permit a petitioner to thus extend the mandated time limit by the filing of a subsequent and duplicative motion. These circumstances simply provide no justification for denying OCF the finality provided by the time limitations of Rule 13. After almost five years, two jury trials, an appeal, Petitioner's subsequent petition for rehearing with a suggestion for rehearing in banc, and her motion to amend the mandate, this litigation should finally conclude.

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[3] Indeed, the only cases cited by Petitioner, Crane v. American Standard, Inc., 490 F.2d 332, 341 (2d Cir. 1973) and Riley v. MEBA Pension Trust, 586 F.2d 968, 972 (2d Cir. 1978), have nothing whatever to do with the issue whether a motion to amend a mandate tolls the time for filing a petition for certiorari.

KULZER'S PETITION FAILS TO RAISE AN ISSUE WARRANTING REVIEW ON WRIT OF CERTIORARI

Even had Kulzer timely filed her Petition for Certiorari, review by this Court is not warranted.

As Kulzer concedes, the relief she seeks is addressed to an alleged error in the Second Circuit's mandate and does not concern "the propriety of the Second Circuit's legal opinion." Motion at 4. She argues, in essence, that the Second Circuit erred in discussing only one claim and dismissing three claims, notwithstanding that the Second Circuit, a Court familiar with the extensive record, declined to act when this alleged error was twice brought to the Court's attention.[4] Petitioner's assertion in her Petition for Certiorari that the alleged error of which she complains deprived her of her right to trial by jury is without merit.

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[4] Contrary to Petitioner's misleading suggestion that OCF did not challenge Petitioner's claim for conscious pain and suffering or her spousal derivative claim (Motion at 2) OCF, in fact, raised, briefed and argued before the Second Circuit issues challenging the entirety of Kulzer's judgment. Indeed, the extensive record before the district court, spanning almost five years, is replete with errors warranting the result reached by the Second Circuit -- the dismissal of Kulzer's action. Dissatisfied with that result, Kulzer petitioned the Second Circuit for rehearing, arguing that because the Second Circuit wrote solely concerning the wrongful death claim, the Court erred in dismissing the entire complaint. The Second Circuit denied the petition for rehearing, noting that the suggestion for rehearing in banc had been "transmitted to the judges of the court in regular active service and to any other judge that heard the appeal" and "no such judge has requested that a vote be taken."

On that logic, any appellate error following a jury trial would raise Seventh Amendment issues.

Clearly, Kulzer's Petition for Certiorari fails to raise any issue of constitutional dimension which would warrant the time and attention of this Court. It sets forth no "special or important reasons" for the grant of certiorari as described in Rule 10 of the Rules of the Supreme Court of the United States. Thus, even were Kulzer's Petition for Certiorari timely filed, it would not qualify for review on writ of certiorari.

Conclusion

For the foregoing reasons, Petitioner's Motion Directing the Clerk to Accept Petitioner's Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
February 4, 1992

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